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No. _____

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IN THE

Supreme Court of the United States

October Term, 1995

JOHN F. CARTER, JOHN M. SWING, AND
JOHN J. VERONIS, JR.,

Petitioners,

v.

HELMSLEY-SPEAR, INC. AND
474431 ASSOCIATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the Visual Artists Rights Act of 1990, Congress for the first time expressly recognized "moral rights" for American artists. These rights were granted to a defined category of creators whose works Congress intended to protect against unauthorized distortion, mutilation, modification or destruction.

1. Whether copyright ownership is a relevant factor in determining whether a work is a "work made for hire" for the purpose of recognizing moral rights under the Visual Artists Rights Act?

2. Whether an otherwise qualifying work of visual art, whose copyright is retained by the work's creators by virtue of a written agreement, is nonetheless a "work made for hire" for the purpose of divesting its creators of their newly established moral rights under the Visual Artists Rights Act?

3. Whether the Court should exercise its supervisory power to overturn the court of appeals' repudiation of the trial court's findings of fact when those findings of fact were not clearly erroneous?

PARTIES TO THE PROCEEDING

The parties to this proceed ng are:

1. Petitioner John F. Carter
2. Petitioner John M. Swing
3. Petitioner John J. Veronis, Jr.
4. Respondent Helmsley-Spear, Inc.
5. Respondent 474431 Associates

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

John F. Carter, John M. Swing and John J. Veronis, Jr. (collectively, "the Artists") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on December 1, 1995, which reversed the decision of the United States District Court for the Southern District of New York enjoining respondents from distorting, mutilating,

modifying, destroying, or removing the Artists' 14,000 square-foot sculpture during the lifetime of the Artists.

OPINIONS BELOW

The opinion of the court of appeals is reported at 71 F.3d 77 (2d Cir. 1995). The opinion of the district court is reported at 861 F. Supp. 303 (S.D.N.Y. 1994). These opinions are reprinted in the Appendix to this Petition.[1]

JURISDICTION

The judgment of the court of appeals reversing and vacating in part and affirming in part the judgment of the district court was entered on December 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The statute involved in this proceeding is the Visual Artists Rights Act of 1990, 17 U.S.C. § 101 *et seq.* (Supp. 1990), a copy of which is reprinted in the Appendix. The Visual Artists Rights Act ("VARA") accords to artists the right to protect their qualifying works of visual art from unauthorized distortion, mutilation, modification, or destruction.

STATEMENT OF THE CASE

This case involves the application of VARA to protect a widely-acclaimed, gargantuan "walk through sculpture" created and installed by the Artists in the lobby of

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1. References to "____a" are to pages of the Appendix.

respondents' mixed-use building in Queens, New York. Although the Artists exclusively controlled the manner and means of creation of their work of art – and expressly retained ownership of the copyright in that sculpture – the Second Circuit Court of Appeals reversed the district court and held that the Artists' sculpture was a "work made for hire" to which the protections of VARA do not extend because of the exclusion from VARA's benefits of any "work made for hire." *See* 17 U.S.C. § 101 (Supp. 1990).

In so doing, the court of appeals erroneously applied the work-for-hire analysis established by the Court to determine copyright ownership in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) [hereinafter *Reid*], to the entirely different situation where the ownership of copyright by the creating party is undisputed. Indeed, the Artists' ownership of copyright in their work here goes to the very core of the reason for VARA's "work made for hire" exclusion, which is simply to ensure that the moral rights created for the first time by VARA are not vested in persons other than the actual creators and initial copyright owners of the work. As the district court properly held,

> "The operative theory incorporated in the Copyright Act is that, when a party hires an employee to create a copyrightable work, the fruits of the employee's endeavors properly belong to the employer. The employer's mandate to the employee, and the scope of the employee's employment, contemplate the creation of copyrightable material for the employer's benefit.
>
> "Under VARA, however, the 'work made for hire' analysis is undertaken for a different purpose: The hired party's employment status is analyzed to ascertain whether a work created by that party may be considered a 'work of visual art.' As such, it is logical to

> consider copyright ownership when the 'work made for hire' analysis is necessary in an action seeking protection of a work of art under VARA."

(52a.)

The Second Circuit's refusal to consider the effect of the Artists' copyright ownership on VARA's "work made for hire" provision was clear error, and has created the anomalous and perverse circumstance where the actual creators and undisputed owners of copyright in a work of visual art are denied Congressionally-established moral rights under a test developed solely to determine ownership of copyright.

The Parties

The Artists are professional sculptors known collectively as the "Three J's." All have studied art, exhibit their works and earn their livelihood from their artistic abilities.

Respondent Helmsley-Spear, Inc. ("Helmsley") is a subsidiary of Helmsley Enterprises, Inc. Respondent 474431 Associates ("Associates"), which has owned the building in question ("the Property") since June 1978, is a New York general partnership whose general partners include a wholly-owned subsidiary of Helmsley. In addition to its role in Associates, Helmsley has served as managing agent of the Property since April 6, 1994.

The Artists' Creation of the Work

On February 1, 1990, Associates leased the Property under a forty-eight year net lease agreement to a limited partnership entitled 47-44 31st Street Associates, L.P. ("the Limited Partnership"). On December 16, 1991, the Artists and the Limited Partnership entered into a written agreement ("the Contract") under which the Artists were to

"design, create and install sculpture and other permanent installations" at the Property. (30a.)

Pursuant to the Contract, the Artists expressly retained the copyright in any artwork created by them at the Property. *Id.* In addition, the Artists had "full authority in design, color and style" with respect to creation of such art work and were to "receive design credit" as well. *Id.* As the Artists testified, it was their role to create a "museum" of their art at the Property.

The Artists began their creative efforts in December 1991, concentrating their work in the 18,000 square foot lobby ("the Lobby") of the Property. The Artists spent the next two and one-half years transforming the Lobby into their artistic vision. Each of them frequently worked as many as 100 hours a week during the creation of their art work (the "Work"). The Artists used a vast array of found and recycled objects and materials to create the Work. During each stage of their progress, the Artists collaborated on the appearance and placement of the Work's sculptural elements and on the use of the available space, color, design and medium.

Helmsley's Interruption of the Artists' Work

On April 6, 1994, Associates repossessed the Property and Helmsley took over management duties of the Property. On April 7, 1994, two agents of Helmsley approached the Artists at the Property and demanded return of the keys to the Artists' on-site workshop space. Helmsley's agents informed the Artists that Helmsley was taking control of the Property, that the Artists "had no rights" and that the Artists were to "hand over the keys." Helmsley's agents informed the Artists that they would be arrested as trespassers if they returned to the Property the following day. Respondents subsequently refused to guarantee that the Work would remain intact.

The Work exists today as it did on April 7, 1994: a breathtaking, gigantic "walk through sculpture," comprised of sculptural elements and mosaic affixed to the floors, walls and ceilings of the Lobby. Among the sculptural elements of the Work are a giant "hand" fashioned from an old school bus, a "God of Automobiles" constructed of sheet metal, a clown that sings to passers-by, human figurines made of old nuts and bolts which whirl when a crank is turned, and an "astronaut" that revolves inside a "moon" fabricated from an old satellite dish and a garbage can lid.

A vast, colorful mosaic spans the Lobby's floor and walls, painstakingly crafted from nearly one million individual pieces of colored, recycled glass covering an area of approximately 10,000 square feet. The mosaic is permanently embedded in the floor and walls and contains patterns and phrases relating to environmental concerns as well as messages relating to the importance of recycling. All of these sculptural elements tell a story conceived by the Artists, and are visually and thematically related. The Work's interactive pieces – including the singing clown, whirling figurines, and revolving astronaut – are dependent upon neighboring sculptural elements for their meaning and have overall significance to the general theme of the Work.

The Work evokes strong reactions in almost all those who see it. It has won widespread artistic acclaim, and has been described by art experts and others as "awesome," "invigorating," "exciting," "evocative emotionally," "absolutely staggering," and "an extraordinary work of art." The Chairman of the Municipal Art Society of New York compared the Work to the "great buildings like the ones here at Foley Square, City Hall, the Metropolitan Museum, [and] the great churches of New York," testifying before the district court that the Work was "worthy of being included in that pantheon of spaces in the city of New York."

This Litigation

The Artists commenced this action by filing a summons and complaint in the district court on April 21, 1994, seeking a temporary restraining order and preliminary injunction under VARA to, *inter alia*, prevent Helmsley from taking any action to alter, deface, modify, or mutilate the Work. On April 26, 1994, the district court issued a temporary restraining order, which it extended on April 28, 1994.

The district court conducted a preliminary injunction hearing from May 5, 1994 to May 13, 1994. On May 18, 1994, the district court issued an opinion and order preliminarily enjoining respondents from altering, defacing, modifying, or mutilating the Work and from denying the Artists access to the Property during limited hours pending trial of the action.

Trial on the merits was conducted by the district court from June to mid-July 1994. Twelve fact and expert witnesses testified, 103 exhibits were admitted into evidence, and the district court personally inspected the Work at the conclusion of the trial. On August 31, 1994, the district court issued its opinion and order, and judgment was entered on September 2, 1994.

The District Court's Decision

The district court's opinion and order enjoined respondents from distorting, mutilating, modifying, destroying, or removing the Work or any of its constituent parts until the death of the last surviving Artist. (88a-90a.) Rejecting Helmsley's arguments that the Work is a collection of entirely separate works and constitutes "applied art," the district court made specific factual findings that the sculptural elements of the Work are all interrelated and thematically consistent, thereby constituting a single "work of visual art" protected under VARA. (34a-37a, 69a.)

The district court then considered and rejected Helmsley's contention that the Work is a "work made for hire" exempt from VARA's protection. In so doing, the district court applied the factors established by the Court in *Reid* and found, *inter alia*, that: (1) the Artists had "unfettered artistic freedom to create the Work and that the hiring party [the Limited Partnership] did not have the right to control the manner and means of creation"; (2) a "high degree of skill" was required by the Artists to create the Work; (3) the hiring party "did not have the authority to direct [the Artists] to perform tasks other than the one they were hired to complete - the installation of art work on the Property;" (4) the Artists were hired solely for the period of time necessary to complete the Work; (5) the Artists "had no set hours and could and did work on the Work at times of their own choosing;" and (6) the Work is not the type of work created in the regular course of the Limited Partnership's business. (39a-51a.) The district court then specifically held that the Artists' ownership of the copyright in the Work was a "plus factor" which supported the finding that the Work was entitled to protection under VARA:

> "Plaintiffs had autonomy to control the manner and means of creation, were skilled artisans who employed their considerable skill in creating the Work, were not subject to assignment of projects unrelated to that which they were hired to accomplish, had no prior relationship with the hiring party and would work for the hiring party only until the completion of the project, had significant discretion to determine when and how long to work, and the creation of works of art was not part of the hiring party's regular business nor a pursuit necessary to the accomplishment of the hiring party's business objectives.

> "On this basis alone, this Court must find that plaintiffs were independent contractors rather than employees. *This finding is bolstered by a plus factor: Plaintiffs own the copyright to the Work. This indicates that the hiring and hired parties considered plaintiffs to be independent contractors.* Accordingly, I find that plaintiffs were not employees at the time the Work was created and that the Work is not a 'work made for hire' as that term is defined in the Copyright Act." (emphasis supplied)

(53a-54a.)

Finally, the district court found as matters of fact that any intentional distortion, mutilation, or modification of the Work would damage the Artists' honor and reputation, and that the Work is one of "recognized stature" under VARA. (58a, 63a.) The district court rejected Helmsley's constitutional challenge to VARA and enjoined respondents from distorting, mutilating, modifying, destroying, or removing any part of the Work during the lives of the Artists. (69a, 88a-90a.)

The Second Circuit's Decision

The Second Circuit reversed and vacated the district court's injunction protecting the Work under VARA. The court of appeals acknowledged both that the Work was an integrated, single piece of art (14a), and that it did not constitute "applied art" unprotected by VARA. (16a.) However, the court of appeals concluded that the Work was one "made for hire" and was thus excluded from the definition of a "work of visual art" under VARA. (22a.)

In so doing, the Second Circuit recognized that the Artists "had complete artistic freedom with respect to every aspect of the sculpture's creation" (18a), and that the Artists'

"conception and execution of the work required great skill in execution." *Id.* Nonetheless, the court of appeals held that other factors set forth in *Reid* (including the Artists' work on additional artistic projects at the Property, provision of some employee benefits, and tax treatment of the Artists) "point towards an employer-employee relationship between the parties." (19a-20a.)

The Second Circuit then expressly refused to accept the district court's reliance on the Artists' ownership of copyright in the Work in concluding that it was not a "work made for hire" under VARA:

> "In reaching its conclusion, the district court also relied partly on the artists' copyright ownership of the sculpture, viewing such ownership as a 'plus factor.' We are not certain whether this element is a 'plus factor,' and therefore put off for another day deciding whether copyright ownership is probative of independent contractor status."

(20a.)

REASONS FOR GRANTING THE WRIT

Preliminary Statement

In 1990, after many years of careful consideration, Congress enacted the Visual Artists Rights Act. VARA protects the rights of attribution and integrity of authors of qualifying works of visual art. These rights, analogous to the "moral rights" (*droit moral*) protected under Article 6bis of the Berne Convention, are not economic in nature but instead embody the very essence of art: the ideas and aesthetics artists decide to convey and with which they choose to be associated.

Congress' recent enactment of VARA constituted this country's first national action to establish an artist's moral

rights. Although long respected in Europe, moral rights are only now becoming accepted in the United States. "'The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.'" H.R. Rep. No. 101-514, 101st Cong., 2d Sess. at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915 [hereinafter *VARA House Rep.*]. This "climate of artistic worth and honor" is of vital national cultural importance. Indeed, as Congress acknowledged: "We should always remember that the visual arts covered by this bill meet a special societal need, and that their protection and preservation serve an important public interest." *Id.* at 5-6.

In this case, the Second Circuit thwarted Congress' attempt to preserve this country's artistic heritage. The Second Circuit turned its back on the legislative goals and philosophy underlying both VARA and the Copyright Act, ignored critical facts, and impermissibly reversed factual findings of the trial court. As a result, the Artists – notwithstanding their retention of copyright ownership – have been stripped of their rights of attribution and integrity in a significant sculptural work, and the fundamental purpose of VARA has been defeated. Conceding that the Artists are the sole creators of the Work, and that the Artists had the foresight to retain copyright ownership in the Work by express agreement before beginning the Work, the court of appeals nonetheless came to the inexplicable conclusion that the Artists are not entitled to their moral rights.

The Second Circuit's opinion has also injected great uncertainty into the interpretation and viability of VARA, and specifically the effect of the statute's work-for-hire exception. The case touches issues of great importance that the Court should resolve in order to maintain the fundamental purpose of VARA: encouraging the arduous work of artistic creation for the public benefit.

I. THE SECOND CIRCUIT CONTRADICTED THIS COURT'S CLEAR PRECEDENT IN *REID* IN REFUSING TO CONSIDER COPYRIGHT OWNERSHIP IN DETERMINING WHETHER THE WORK IS ONE "MADE FOR HIRE."

It is undisputed that at all relevant times Associates owned the Property where the Artists created and installed the Work, and that the entity that managed the property for Associates' lessee entered into a written agreement providing that the Artists would retain all of their rights under copyright in the Work. (5a.)

The Court has conclusively stated that, in determining whether a work is one "made for hire" under section 101 for copyright purposes, the finder of fact must "ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor." *Reid*, 490 U.S. at 751. Although it purported to apply the law as set out by the Court in *Reid* in assessing whether the Artists were employees or independent contractors, the court of appeals here reversed the trial court's specific finding that copyright ownership supported the conclusion that the Artists were independent contractors, not employees. Instead, the Second Circuit refused to consider the Artists' ownership of copyright, stating that it would "put off for another day deciding whether copyright ownership is probative of independent contractor status."[2] (20a.) In so doing, the Second Circuit has disregarded the letter and spirit of the law as

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2. Although the Second Circuit attempts to temper its outright refusal to consider copyright ownership in its analysis of the *Reid* factors (20a), the court's holding is clearly colored by its unwillingness to analyze this important factor.

determined by *Reid*, while abandoning logic and common sense.

The Court in *Reid* recognized that the list of factors utilized to determine whether the artist in that case was an employee was "non-exhaustive." *Reid*, 490 U.S. at 752. Until the passage of VARA, the determination of whether a work was one "made for hire" served the sole purpose of determining copyright ownership. *See* 17 U.S.C. §§ 201(a), 201(b) (Supp. 1990). It is thus obvious and not surprising that before VARA, copyright ownership had never been one of the factors weighed in a work-for-hire analysis. However, it is equally apparent that, in the context of determining whether a work of art is created by an employee or an independent contractor, there can be no more important fact than copyright ownership.

Copyright ownership represents the economic and exploitation rights of a given work of art. If the art owner does not also own copyright in that work, he or she may not, without the copyright owner's permission, reproduce, create derivative works based on, distribute copies of, or even publicly display the work. Those rights are among the exclusive rights of the copyright holder. *See* 17 U.S.C. § 106 (Supp. 1990). In sum, the entire economic potential of a given copyrighted work (other than the potential private resale value of the "material object," *see* 17 U.S.C. § 202 (Supp. 1990)) is held by the copyright owner. Copyright ownership is not only relevant but also crucial in determining whether an art purchaser is actually a master and the artist a servant in the art-purchaser/artist relationship.

Indeed, while the Second Circuit correctly recognized that "the [*Reid*] factors are weighed by referring to the facts of a given case" (17a), the court of appeals failed to follow its own instruction. Within the context of the art-purchaser/artist relationship, what factor could be more important than copyright ownership? In this case, where

the Second Circuit upheld the trial court's findings that the Artists had "complete artistic freedom with respect to every aspect of the sculpture's creation" (18a), and that "professional sculpting is a highly skilled occupation," *id.*, the fact that the Artists also own the copyright in the Work further bolsters the trial court's proper conclusion that the Artists were independent contractors.

II. THE SECOND CIRCUIT'S REFUSAL TO CONSIDER COPYRIGHT OWNERSHIP IN DETERMINING WHETHER THE WORK IS PROTECTIBLE UNDER VARA CREATES AN INDEFENSIBLE CONSTRUCTION OF BOTH VARA AND THE COPYRIGHT LAW.

A. The Second Circuit Has Disregarded Congress' Decision On How To Allocate VARA Rights And Thwarted Its Paramount Goal Of Enhancing The Predictability Of Copyright And VARA Rights Ownership By Ignoring An Express Prior Agreement.

Before a single mosaic tile was placed and before a single sculptural element was created, the Artists and the commissioning party expressly agreed that the Artists were to be the owners of copyright in the Work. In ignoring the express written agreement by the non-creator art buyer that it would not be considered the author and the copyright owner of the Work, the Second Circuit has thwarted "Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership . . . at the outset." *Reid*, 490 U.S. at 749-50 (citations omitted). In its unanimous 1989 decision in *Reid*, the Court emphasized "Congress' goal of ensuring predictability through advance planning" in order to prevent unilateral claims of copyright ownership years after the work has been completed. *Id.* at 750. One year later, in selecting the same work-for-hire doctrine for the added role

of identifying works protected by VARA, Congress obviously intended to promote the same goal of enhancing predictability with respect to the newly added "moral rights" of visual artists that it had intended to foster previously with respect to determination of initial ownership of copyright.

The Court in *Reid* recognized that "'[a]rtists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law . . . .'" *Id.* at 747 n. 13 (citation omitted). And yet, in this case, the Artists had the foresight and capability to retain copyright in the Work by express agreement. This determination by the parties negotiated before the Work was created should be dispositive of the work-for-hire issue as it relates to VARA. Nevertheless, the Second Circuit expressly refused to consider this important fact, thereby creating a grave uncertainty regarding VARA rights that Congress intended to avoid. Furthermore, the court of appeals' decision has now impermissibly forced artists to obtain specific assurances in order to retain their moral rights that by statute attach automatically upon creation.

The Second Circuit has thus placed upon artists the onerous and expensive burden of litigating the *Reid* factors as a further condition of establishing their VARA rights, even in cases where they have at the outset secured copyright ownership rights. The whole purpose of evaluating the *Reid* work-for-hire factors is to determine initial copyright ownership in instances where there is an ownership dispute. *See Reid*, 490 U.S. at 732. The court of appeals has created an unfortunate and ironic rule of law with the consequence that those individuals least equipped to engage in ownership litigation – who had the foresight and good fortune to have at the "outset" favorably settled copyright ownership issues – have discovered that their express written agreements still leave them at risk of losing the rights Congress created for artists in VARA through a complicated, uncertain and expensive litigation of the *Reid*

factors. This perverse result ignores the stated purposes Congress intended in passing VARA. There should be simply no need to engage in the *Reid* analysis where an unambiguous written agreement provides that the Artists will retain copyright ownership in their Work.

B. The Second Circuit's Opinion Also Ignores Congress' Intention In Excluding Works "Made For Hire" From VARA Protection.

The Second Circuit correctly stated that, "[b]ecause they are personal to the artist, moral rights exist independently of an artist's copyright in his or her work." (7a.) Indeed, VARA protects qualifying works *regardless of who owns the copyright therein*. *See* 17 U.S.C. § 106A(b) (Supp. 1990). Moral rights are linked to an artist's "personality," rather than his or her pocketbook: "[W]hereas rights of copyright ownership are freely transferable, artists' rights are inalienable. That conclusion flows from the conceptualization of such rights as personal to the artist, *arising out of the creative process.*" 2 David Nimmer & Melville B. Nimmer, *Nimmer on Copyright* § 8D.06[A] at 8D-70 (1994) [hereinafter *Nimmer*] (emphasis added). The whole point of separating ownership of moral rights from copyright was to ensure that, even where a visual artist loses his or her copyright, the creator may still retain the VARA rights. It does not follow from such a distinction that retention of copyright is irrelevant to ownership of the VARA rights or that such copyright ownership can be ignored as substantial evidence signifying the parties' intent that an artist has retained his or her moral rights.

In utilizing the "work for hire" provision to define "a work of visual art" in VARA, Congress sought to ensure that "moral rights" not vest in persons other than the actual creators of the work. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 Cath. U. L. Rev. 945, 987 (1990) [hereinafter *Damich*]. Copyright scholar Jane C. Ginsburg

has explained that the "work for hire" provision of VARA also serves: "1) to reassure large exploiters, such as publishers of periodicals, that they need not fear moral rights claims from artists creating works for their publications;" and "2) to limit the law's coverage to objects of 'Art,' rather than of mass production." Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 Colum. VLA J.L. & Arts 477, 480 (1990) [hereinafter *Ginsburg*].

Thus, use of the work-for-hire doctrine to determine the existence of VARA protection was designed to ensure that moral rights would belong only to actual creators of works of visual art. In defining the scope of VARA rights, the statute states that "[o]nly the author of a work of visual art has the rights conferred" by the statute. 17 U.S.C. § 106A(b) (Supp. 1990). Because employers and parties commissioning works for hire will be deemed authors under the Copyright Act for copyright ownership purposes, were it not for the "work for hire" exception of VARA, employers and commissioning parties who did not create a work of visual art would nonetheless also hold moral rights in the work. This is "a result antithetical to moral rights theory." *Damich* at 987.[3]

Here, however, the court of appeals utilized the work-for-hire provision of VARA to *deny* the Artists, undisputed creators and copyright owners of the Work, their moral

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3. Similarly, typical employers or commissioning parties in the work-for-hire setting (such as publishers) that are the putative authors pursuant to the work-for-hire doctrine and thus own the copyright in the works for hire are protected from claims by the actual creators of the work (their employees) demanding credit for and preventing changes to collective or "mass produced" works.

rights. In so doing, the Second Circuit ignored the reasoning behind this provision – that of encouraging artistic creation by preserving moral rights for the artist, even if he or she is not the copyright owner. Properly understood, the work-for-hire exception to VARA is not designed to carve out of the protections of VARA *all* works whose copyright is not owned by the original author, but only that narrow class of works whose copyright is first owned by a statutorily created "author," one who did not create the work but hired an employee to do so in its stead.

At the beginning of its opinion, the Second Circuit correctly notes that VARA "did not mandate the preservation of art at all costs and without due regard for the rights of others." (4a.) However the court of appeals nowhere explains whose rights are being regarded in denying the Artists their VARA rights. Indeed, neither of Congress' reasons for including the work-for-hire exception in VARA – (1) ensuring that only artists can assert moral rights; and (2) ensuring that entities who are deemed "authors" pursuant to the work-for-hire provision will not be effectively prevented from exploiting a work by a creator asserting moral rights – are present in this case. The Artists are clearly the creators of the Work. In addition, no employer's or commissioning party's rights in the Work are being invaded or encumbered. Indeed, respondents did not commission the Work at all.[4]

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4. Respondents cannot assert that their rights in the Property are affected by the presence of the Work. VARA specifically provides for protection of building owners by allowing them to remove and destroy works upon written acknowledgment by the artist that installation of a work will subject it to possible damage or destruction upon its removal. *See* 17 U.S.C. § 113(d) (Supp. 1990). In the Artists' agreement, the

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The Second Circuit performed no analysis of Congress' intent in excepting works "made for hire" from the protections of VARA. Instead, the Second Circuit's mechanical misapplication of the *Reid* test improperly avoids analysis of the Artists' ownership of copyright, determined *ab initio* by express agreement, and yields the bizarre result that the Artists, who created the Work and own its copyright, do not have moral rights in the Work, while respondents – entities which neither commissioned nor have any rights in the Work – have been awarded the right to distort, mutilate, modify, and even destroy the Work.

C. The Second Circuit Disregarded The Reason Congress Elected To Employ The Work-For-Hire Doctrine For The Purpose Of Allocating The Non-Economic Benefits Provided By VARA, Namely To Grant Those Rights To Artists Who Are Both Actual Creators And Initial Copyright Owners Of A Work.

As between the parties, the Contract between the Artists and the Limited Partnership not only established the Artists as the initial copyright owners under section 201(b) of the Copyright Act, but because "[c]opyright . . . vests initially in the author or authors of the work," 17 U.S.C. § 201(a) (Supp. 1990), it also effectively reversed the otherwise applicable statutory consequence of the work-for-hire doctrine that the

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commissioning party did not avail itself of the protections provided under Section 113(d).

non-creator hiring party shall be "considered the author." *See* 17 U.S.C. § 201(b) (Supp. 1990).[5]

The court of appeals recognized the indisputable fact that, by agreement, the Artists "retain[ed] copyrights to their work . . ." (5a.) For the reasons set forth below, such an express written agreement by the art buyer meant not only that the person for whom the Work was prepared was not the initial copyright owner, *see* 17 U.S.C. § 201(b) (Supp. 1990), but is also determinative that, for the purposes of the VARA amendments to Title 17, the Work may not be considered one "made for hire" so as to be excluded from the definition of a "work of visual art" in section 101 of that Title.

Congress' undisputed purpose in promulgating VARA was to encourage creative effort by adding a new set of rights for visual artists – to preserve the works of visual artists from unauthorized mutilation, modification or destruction and to protect the reputations of visual artists, in the public interest. *See* VARA House Rep. at 5-6.[6] VARA

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5. According to the legislative history relating to section 201(b), any arguable distinction between initial ownership and the "author" status of an employer notwithstanding, the latter's written agreement to the contrary, *see 1 Nimmer* § 5.03[D], was not intended to have significance insofar as the parties were concerned *inter se*, but would only relate to "third persons," *e.g.*, with regard to the duration of copyright protection under 17 U.S.C. § 302(c). *See* Office of the Register of Copyrights, 89th Cong., 1st Sess., Supplementary Register's Report on the General Revision of the U.S. Copyright Law 68 (Comm. Print 1965), *reprinted in* 5 *Nimmer* at 15-95, 15-96.

6. Reports of Congressional standing committees are persuasive indicia of Congressional intent. *See Reid*, 490 U.S. at 743-51; 2A Norman J. Singer, *Statutes and Statutory Construction* § 48.06, 48.08 at 332 & 340 (5th Ed. 1992).

does not apply to all artworks, but only to those falling within the definition of a "work of visual art" which VARA added to 17 U.S.C. § 101. In subparagraph (B) of the definition, Congress excluded "any work made for hire." 17 U.S.C. § 101 (Supp. 1990). As demonstrated below, by using "work made for hire," Congress intended to use a work's initial copyright ownership to determine the nature of the relationship between a creating artist and hiring party.

The Court's methodology in interpreting the phrase "work made for hire" in *Reid* is particularly instructive in interpreting Congress' use of it in VARA. *See Reid*, 490 U.S. at 737-42. As Justice Marshall explains, the starting point is the statutory language, *id.* at 739, which uses the term "work made for hire" in section 101's definition of a "work of visual art." By using such a term, Congress meant to incorporate its established meaning under the 1976 Copyright Act, of which it was well aware. *See Id.* at 737-39. The term "work made for hire" refers to the work-for-hire doctrine embodied in the pre-existing work-for-hire provisions of the statute. *Id.* at 732 (to resolve dispute as to copyright ownership requires construction of work-for-hire "provisions").

Thus, *Reid* teaches that the statutory interpretation of the work-for-hire doctrine begins with the text and goes on to embody the statute's "structure." *See id.* at 737, 747-49. One must thus start with the general rule set forth in section 201(a) that copyright ownership vests initially in the author. *Id.* at 737. The author is the party who actually creates the work, and "works made for hire" are "an exception" where the author is considered to be the person for whom the work is prepared. *Id.* While section 101 contains the definition of "work made for hire," other provisions referring to "work made for hire" and embodying the work-for-hire doctrine inform and illuminate its meaning in any particular case.

The legislative history of section 201 in like fashion explains the "basic and well-established" principle of copyright "that the source of copyright ownership is the author of the work . . ." H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5737.[7]

The legislative history of the VARA amendments similarly makes clear that Congress intended to draw the dividing line between protected and unprotected works under VARA on the basis of the "critical" difference in the way various kinds of visual artworks are created, initially owned, and typically distributed and marketed. VARA House Rep. at 9. Thus, in defining protected works of visual art, Congress once again looked to the parties' own decision as to copyright ownership for the statutory criterion that would distinguish covered from uncovered works and authors. More specifically, Congress chose to include in the definition of "a work of visual art" those works created by individual artists who typically owned the economic rights in their creations instead of contributing their efforts to collaborative works such as motion pictures. VARA House Rep. at 9.[8]

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7. The particular significance of the legislative history of the 1976 Copyright Act to the statute's interpretation, as the product of two decades of negotiation by creators and copyright-using industries, supervised by the Copyright Office and Congress, is well established. *See, e.g., Reid*, 490 U.S. at 743-48.

8. In analyzing the new legislation, the VARA House Report makes no specific comment on section 101's "work of visual art" definitional exclusion in subparagraph (B) of a "work made for hire." However, the VARA House Report's "Background" discussion with respect to the legislation and its coverage addresses in some detail the "critical" and factual

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The statutory link between initial copyright ownership and the author as its "source" establishes the reason for Congress' selection in 1990 of the work-for-hire doctrine as part of section 101's definition of a "work of visual art" for the purpose of identifying those works that would not be covered by the VARA amendments: the work-for-hire doctrine would achieve Congress' objective because section 201(b) expressly provides that the actual creator and person for whom a work is prepared may agree in writing that the latter will not be the initial copyright owner, while section 201(a) expressly provides that copyright ownership "vests initially in the author or authors of the work." *See* 17 U.S.C. §§ 201(a), 201(b) (Supp. 1990).

In view of the above-noted Congressional goal for VARA – to protect those visual artists who usually retain their economic rights from injury to their artistic reputation and from mutilation, modification or destruction of their works – it makes perfect sense to use initial copyright ownership to determine whether a particular work in the physical possession of a person for whom it was prepared should be protected under VARA. In other words, Congress elected to employ the work-for-hire doctrine, which "allocates ownership of the economic rights" in a work, *Ginsburg* at 484, for the additional similar purpose of allocating the non-economic benefits of authorship to be

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legal differences between covered and deliberately excluded works in terms of what rights of initial ownership are typically retained by the creator. VARA House Rep. at 9.

granted by VARA. *Id.* (criticizing Congress' use of the work-for-hire doctrine for this purpose).[9]

It could not have been Congress' intent to disregard the parties' prior written agreement by allowing an art buyer to claim after the fact that an artistic work is one "made for hire" – solely for VARA purposes – where the purchaser was not the actual artist and had agreed in writing that it would not be considered the author/initial copyright owner for all other purposes under the Copyright Act. In making such a distinction between (a) those considered authors and owners for authorship, copyright ownership and protection purposes, and (b) those entitled to the new moral rights created by VARA in a case where these two categories coincide, the Second Circuit defeated the overarching, paramount goal of the Copyright Act of enhancing predictability in the marketplace as to ownership of the rights provided by the statute and certainty through negotiations and agreements entered into at the outset, *see Reid*, 490 U.S. at 749-50; has disregarded the fundamental purpose of VARA to encourage creation by protecting artists and preserving their works for the public benefit; has overlooked Congress' expression of intent in the legislative history to draw the dividing line between protected and unprotected works on the basis of who was considered the initial copyright owner and author; and has ignored what

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9. As explained by the Court in *Reid*, the work-for-hire classification had previously determined not only whether a party for whom a work was prepared was considered the "author" and initial owner of its copyright, but also the copyright's duration under section 302(c) and the owners of renewal rights under section 304(a), copyright termination rights under section 203(a), and the right to import certain goods bearing the copyright under section 601(b)(1). *See Reid*, 490 U.S at 737.

Congress intended to guard against in excepting works "made for hire" from VARA protection.

III. BY SUBSTITUTING ITS OWN FACTUAL FINDINGS FOR THOSE OF THE DISTRICT COURT, THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Under Fed. R. Civ. P. Rule 52(a), a district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In making a determination that the trial court erred in finding that the commissioning party did not have the right to assign additional projects to the Artists (18a), the court of appeals so transgressed these mandates as to warrant the grant of certiorari on this basis alone. *See, e.g., Anderson v. City of Bessemer City,* 470 U.S. 564 (1985).

The Court has stated on numerous occasions that, "[d]etermining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982). It has spelled out the restrictions under which the court of appeals must operate; for instance, "a reviewing court . . . [cannot] reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573. Further, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

In this case, the evidence below showed that the commissioning party did *not* have the right to assign additional work to the Artists. Indeed, on at least one occasion, the Artists specifically declined to perform a task

in another building when requested to do so by the commissioning party. (46a-47a.) The Artists were not terminated nor were they docked in pay for their refusal; the evidence simply did not support a finding that the commissioning party could assign them additional work. *Id.*

Since the Second Circuit's improper appellate fact finding in violation of Rule 52(a) was a major underpinning on which that court rested its erroneous legal ruling that the Work was a work "made for hire" (18a-19a), the Court should exercise its supervisory power to review and reverse this error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 29, 1996

Respectfully submitted,

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APPENDIX

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Opinion of the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1269, 1549 — August Term, 1994

(Argued March 15, 1995 Decided December 1, 1995)

Docket Nos. 94-7990, 94-9038

JOHN CARTER, JOHN SWING AND JOHN VERONIS,

Plaintiffs-Counter-Claim-Defendants-Appellees-Cross-Appellants,

— v. —

HELMSLEY-SPEAR, INC. and 474431 ASSOCIATES,

Defendants-Counter-Claimants-Appellants-Cross-Appellees.

Before:

MESKILL, CARDAMONE, and ALTIMARI,

Circuit Judges.

Defendants, owner and managing agent of a building, appeal from an order of the United States District Court for the Southern District of New York (Edelstein, J.) enjoining them from modifying, destroying, and removing a work of visual art incorporated into the building by plaintiffs, artists commissioned by a former tenant to install the work, and dismissing defendants' counterclaim for waste. Plaintiffs

cross-appeal the dismissal of their claim for tortious interference with contractual relations and denial of their requests to complete the work and for attorney's fees and costs.

Reversed and vacated, in part, affirmed, in part.

ADRIAN ZUCKERMAN, New York, New York (Robert C. Boneberg, Jill Rosenthal, Davidoff & Malito, New York, New York, of counsel), *for Defendants-Counter-Claimants-Appellants-Cross-Appellees.*

CHARLES LOZOW, New York, New York (Daniel H. Weiner, John J. McGreevy, Patrick T. Perkins, Hughes Hubbard & Reed, New York, New York, of counsel), *for Plaintiffs-Counter-Claim-Defendants-Appellees-Cross-Appellants.*

RICHARD A. ALTMAN, New York, New York, *for Plaintiffs-Counter-Claim-Defendants-Appellees-Cross-Appellants.*

Edward N. Costikyan, New York, New York (David Nissenbaum, The Municipal Art Society of New York, Inc., New York, New York, of counsel), *filed a brief on behalf of the Municipal Art Society of New York, Inc. as Amicus Curiae.*

Eli R. Mattioli, New York, New York (Robert C. Buff, Douglas D. Aronin, Wien, Malkin & Bettex, New York, New York, of counsel), *filed a brief on behalf of The Real Estate Board of New York, Inc. as Amicus Curiae.*

Roger L. Zissu, New York, New York (James D. Silberstein, Weiss Dawid Fross Zelnick & Lehrman, P.C., New York, New York, of

counsel), *filed a brief on behalf of Volunteer Lawyers for the Arts as Amicus Curiae.*

—

CARDAMONE, Circuit Judge:

Defendants 474431 Associates and Helmsley-Spear, Inc. (defendants or appellants), as the owner and managing agent respectively, of a commercial building in Queens, New York, appeal from an order of the United States District Court for the Southern District of New York (Edelstein, J.), entered on September 6, 1994 following a bench trial. The order granted plaintiffs, who are three artists, a permanent injunction that enjoined defendants from removing, modifying or destroying a work of visual art that had been installed in defendants' building by plaintiffs-artists commissioned by a former tenant to install the work. *See Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994). Defendants also appeal from the dismissal by the trial court of their counterclaim for waste. Plaintiffs cross-appeal from the dismissal of their cause of action for tortious interference with contractual relations and from the denial of their requests to complete to work and for an award of attorney's fees and costs.

On this appeal we deal with an Act of Congress that protects the rights of artists to preserve their works. One of America's most insightful thinkers observed that a country is not truly civilized "where the arts, such as they have, are all imported, having no indigenous life." 7 Works of Ralph Waldo Emerson, Society and Solitude, Chapt. II *Civilization* 34 (AMS. ed. 1968). From such reflection it follows that American artists are to be encouraged by laws that protect their works. Although Congress in the statute before us did

just that, it did not mandate the preservation of art at all costs and without due regard for the rights of others.

For the reasons that follow, we reverse and vacate the grant of injunctive relief to plaintiffs and affirm the dismissal by the district court of plaintiffs' other claims and its dismissal of defendants' counterclaim for waste.

BACKGROUND

Defendant 474431 Associates (Associates) is the owner of a mixed use commercial building located at 47-44 31st Street, Queens, New York, which it has owned since 1978. Associates is a New York general partnership. The general partners are Alvin Schwartz and Supervisory Management Corp., a wholly-owned subsidiary of Helmsley Enterprises, Inc. Defendant Helmsley-Spear, Inc. is the current managing agent of the property for Associates.

On February 1, 1990 Associates entered into a 48-year net lease, leasing the building to 47-44 31st Street Associates, L.P. (Limited Partnership), a Delaware limited partnership. From February 1, 1990 until June 1993, Irwin Cohen or an entity under his control was the general partner of the Limited Partnership, and managed the property through Cohen's SIG Management Company (SIG). Corporate Life Insurance Company (Corporate Life) was a limited partner in the Limited Partnership. In June 1993 SIG ceased its involvement with the property and Corporate Life, through an entity controlled by it, became the general partner of the Limited Partnership. The property was then managed by the Limited Partnership, through Theodore Nering, a Corporate Life representative. *See* 861 F. Supp. at 312. There is no relationship, other than the lease, between Associates, the lessor, and the Limited Partnership, the lessee.

Plaintiffs John Carter, John Swing and John Veronis (artists or plaintiffs) are professional sculptors who work together and are known collectively as the "Three-J's" or "Jx3." On December 16, 1991 SIG entered into a one-year agreement with the plaintiffs "engag[ing] and hir[ing] the Artists ... to design, create and install sculpture and other permanent installations" in the building, primarily the lobby. Under the agreement plaintiffs had "full authority in design, color and style," and SIG retained authority to direct the location and installation of the artwork within the building. The artists were to retain copyrights to their work and SIG was to receive 50 percent of any proceeds from its exploitation. On January 20, 1993 SIG and the artists signed an agreement extending the duration of their commission for an additional year. When Corporate Life became a general partner of the Limited Partnership, the Limited Partnership assumed the agreement with plaintiffs and in December 1993 again extended the agreement.

The artwork that is the subject of this litigation is a very large "walk-through sculpture" occupying most, but not all, of the building's lobby. The artwork consists of a variety of sculptural elements constructed from recycled materials, much of it metal, affixed to the walls and ceiling, and a vast mosaic made from pieces of recycled glass embedded in the floor and walls. Elements of the work include a giant hand fashioned from an old school bus, a face made of automobile parts, and a number of interactive components. These assorted elements make up a theme relating to environmental concerns and the significance of recycling.

The Limited Partnership's lease on the building was terminated on March 31, 1994. It filed for bankruptcy one week later. The property was surrendered to defendant Associates on April 6, 1994 and defendant Helmsley-Spear, Inc. took over management of the property. Representatives

of defendants informed the artists that they could no longer continue to install artwork at the property, and instead had to vacate the building. These representatives also made statements indicating that defendants intended to remove the artwork already in place in the building's lobby.

As a result of defendants' actions, artists commenced this litigation. On April 26, 1994 the district court issued a temporary restraining order enjoining defendants from taking any action to alter, deface, modify or mutilate the artwork installed in the building. In May 1994 a hearing was held on whether a preliminary injunction should issue. The district court subsequently granted a preliminary injunction enjoining defendants from removing the artwork pending the resolution of the instant litigation. *See Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994).

A bench trial was subsequently held in June and July 1994, at the conclusion of which the trial court granted the artists the permanent injunction prohibiting defendants from distorting, mutilating, modifying, destroying and removing plaintiffs' artwork. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 337 (S.D.N.Y. 1994). The injunction is to remain in effect for the lifetimes of the three plaintiffs. Plaintiffs' other claims, including their cause of action for tortious interference and a request for an award of costs and attorney's fees and that they be allowed to continue to add to the artwork in the lobby, as well as defendants' counterclaim for waste, were all dismissed with prejudice. This appeal and cross-appeal followed.

DISCUSSION

I. Artists' Moral Rights

A. History of Artists' Moral Rights

Because it was under the rubric of the Visual Artists Rights Act of 1990 that plaintiffs obtained injunctive relief in the district court, we must explore, at least in part, the contours of that Act. In doing so it is necessary to review briefly the concept of artists' moral rights and the history and development of those rights in American jurisprudence, which led up to passage of the statute we must now examine.

The term "moral rights" has its origins in the civil law and is a translation of the French *le droit moral*, which is meant to capture those rights of a spiritual, non-economic and personal nature. The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved. *See* Ralph E. Lerner & Judith Bresler, *Art Law* 417 (1989) (*Art Law*). Because they are personal to the artist, moral rights exist independently of an artist's copyright in his or her work. *See, e.g.*, 2 *Nimmer on Copyright* 8D-4 & n.2 (1994) (*Nimmer*).

While the rubric of moral rights encompasses many varieties of rights, two are protected in nearly every jurisdiction recognizing their existence: attribution and integrity. *See Art Law* at 420. The right of attribution generally consists of the right of an artist to be recognized by name as the author of his work or to publish anonymously or pseudonymously, the right to prevent the author's work from being attributed to someone else, and to prevent the use of the author's name on works created by others, including distorted editions of the author's original work. *See, e.g., id.*

at 419-20; *Nimmer* at 8D-5. The right of integrity allows the author to prevent any deforming or mutilating changes to his work, even after title in the work has been transferred. *See, e.g., Art Law* at 420.

In some jurisdictions the integrity right also protects artwork from destruction. Whether or not a work of art is protected from destruction represents a fundamentally different perception of the purpose of moral rights. If integrity is meant to stress the public interest in preserving a nation's culture, destruction is prohibited; if the right is meant to emphasize the author's personality, destruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist and destruction may proceed. *See Art Law* at 421; *see also* 2 William F. Patry, *Copyright Law and Practice* 1044 n.128 (1994) (*Copyright Law*) (noting the different models but suggesting that "destruction of a work shows the utmost contempt for the artist's honor or reputation").

Although moral rights are well established in the civil law, they are of recent vintage in American jurisprudence. Federal and state courts typically recognized the existence of such rights in other nations, but rejected artist's attempts to inject them into U.S. law. *See, e.g., Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947); *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 573-76 (N.Y. Sup. Ct. 1949). Nonetheless, American courts have in varying degrees acknowledged the idea of moral rights, cloaking the concept in the guise of other legal theories, such as copyright, unfair competition, invasion of privacy, defamation, and breach of contract. *See Nimmer* at 8D-10; *Art Law* at 423.

In the landmark case of *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976), we relied on copyright law and unfair competition principles to safeguard the integrity rights of the "Monty Python"

group, noting that although the law "seeks to vindicate the economic, rather than the personal rights of authors ... the economic incentive for artistic ... creation ... cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent." *Id.* at 24. Because decisions protecting artists rights are often "clothed in terms of proprietary right in one's creation," we continued, "they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form." *Id.*

Artists fared better in state legislatures than they generally had in courts. California was the first to take up the task of protecting artists with the passage in 1979 of the California Art Preservation Act, Cal. Civ. Code § 987 *et seq.* (West 1982 & Supp. 1995), followed in 1983 by New York's enactment of the Artist's Authorship Rights Act, N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney Supp. 1995). Nine other states have also passed moral rights statutes, generally following either the California or New York models. *See generally Art Law* at 430-35; *id.* at 301-09 (Supp. 1992) (describing the different states' laws).

B. *Visual Artists Rights Act of 1990*

Although bills protecting artists' moral rights had first been introduced in Congress in 1979, they had drawn little support. *See Copyright Law* at 1018 n.1. The issue of federal protection of moral rights was a prominent hurdle in the debate over whether the United States should join the Berne Convention, the international agreement protecting literary and artistic works. Article 6*bis* of the Berne Convention protects attribution and integrity, stating in relevant part:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6*bis*, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986).

The Berne Convention's protection of moral rights posed a significant difficulty for U.S. adherence. *See Copyright Law* at 1022 ("The obligation of the United States to provide *droit moral* ... was the single most contentious issue surrounding Berne adherence."); *Nimmer* at 8D-15 ("During the debate over [the Berne Convention Implementation Act], Congress faced an avalanche of opposition to moral rights, including denunciations of moral rights by some of the bill's most vociferous advocates."); H.R. Rep. No. 514, 101st Cong., 2d Sess. 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917 ("After almost 100 years of debate, the United States joined the Berne Convention .... [C]onsensus over United States adherence was slow to develop in large part because of debate over the requirements of Article 6*bis*.").

Congress passed the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988), and side-stepped the difficult question of protecting moral rights. It declared that the Berne Convention is not self-executing, existing law satisfied the United States' obligations in adhering to the Convention, its provisions are not enforceable through any action brought pursuant to the Convention itself, and neither adherence to the Convention nor the implementing legislation expands or reduces any rights under

federal, state, or common law to claim authorship of a work or to object to any distortion, mutilation, or other modification of a work. *See id.* §§ 2, 3; *see also* S. Rep. No. 352, 100th Cong., 2d Sess. 9-10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714-15.

Two years later Congress enacted the Visual Artists Rights Act of 1990 (VARA or Act), Pub. L. No. 101-650 (tit. VI), 104 Stat. 5089, 5128-33 (1990). Construing this Act constitutes the subject of the present appeal. The Act

> protects both the reputations of certain visual artists and the works of art they create. It provides these artists with the rights of "attribution" and "integrity."...
>
> These rights are analogous to those protected by Article 6*bis* of the Berne Convention, which are commonly known as "moral rights." The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.

H.R. Rep. No. 514 at 5 (internal quote omitted). The Act brings to fruition Emerson's insightful observation.

Its principal provisions afford protection only to authors of works of visual art—a narrow class of art defined to include paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer. 17 U.S.C. § 101 (Supp. III 1991). With numerous exceptions, VARA grants three rights: the right of attribution, the right of integrity and, in the case of works of visual art of "recognized stature," the right to prevent destruction. 17 U.S.C. § 106A (Supp. III 1991). For works created on or after June 1, 1991—the effective date of the Act—the rights provided for endure for the life of the author or, in the case of a joint work,

the life of the last surviving author. The rights cannot be transferred, but may be waived by a writing signed by the author. Copyright registration is not required to bring an action for infringement of the rights granted under VARA, or to secure statutory damages and attorney's fees. 17 U.S.C. §§ 411, 412 (1988 & Supp. III 1991). All remedies available under copyright law, other than criminal remedies, are available in an action for infringement of moral rights. 17 U.S.C § 506 (1988 & Supp. III 1991). With this historical background in hand, we pass to the merits of the present litigation.

II. Work of Visual Art

Because VARA is relatively new, a fuller explication of it is helpful. In analyzing the Act, therefore, we will follow in order the definition set forth in § 101, as did the district court when presiding over this litigation. The district court determined that the work of art installed in the lobby of Associates' building was a work of visual art as defined by VARA; that distortion, mutilation, or modification of the work would prejudice plaintiffs' honor and reputations; that the work was of recognized stature, thus protecting it from destruction (including removal that would result in destruction); and that Associates consented to or ratified the installation of the work in its building. The result was that defendants were enjoined from removing or otherwise altering the work during the lifetimes of the three artists.

A. *Singleness of the Work*

As a preliminary matter, we must determine whether the trial court correctly found that the work is a single piece of art, to be analyzed under VARA as a whole, rather than separate works to be considered individually. This finding was a factual one reviewed under the clearly erroneous standard. For purposes of framing the issues at trial the

parties entered into a joint stipulation relating to numerous facts, including a definition of "the Work." This stipulated definition contained a long, detailed list of all the sculptural elements contained in the building's lobby. The district court found that, with a few precise exceptions determined to be separate works of art, the artwork created by plaintiffs in the lobby was a single work. *See* 861 F. Supp. at 314-15. This finding was based on testimony, credited by the trial judge, of the artists themselves and of their expert witnesses.

The trial court found further support for its conclusion in the method by which the artists created the work—each additional element of the sculpture was based on the element preceding it so that they would mesh together. The result was a thematically consistent, interrelated work whose elements could not be separated without losing continuity and meaning. *See id.* at 315. The record evidence of singleness was confirmed at the request of the parties by the district court's own inspection of the work.

Appellant's primary contention is that the finding of singleness is inconsistent with a finding that certain works of art were separate from the work that is the subject of this appeal. This assertion rests on the mistaken belief that the parties' joint stipulation to a definition of "the Work" precluded an ultimate determination by the factfinder that most but not all of the work installed in the lobby was a single artwork. In other words, according to appellants, either every component in the stipulated definition is part of a single work or every component is an individual work; there is no middle ground. Appellants' goal is to have VARA applied to each element of the sculpture individually, so that components that may not be visual art standing alone cannot be considered visual art when they are combined by the artists to create a whole that has a nature different than the mere sum of its parts.

Appellants' goal is not attainable. The parties stipulated that when they used the term "the Work" it included a list of sculptural components. The result was that during the trial there was no dispute as to the parties' meaning when referring to "the Work." The trial court was free to find that a few items of "the Work" were separate works of art, while the remainder of "the Work" was a single, interrelated, indivisible work of art. The finding of singleness was based on the determinations of witness credibility as well as the district court's own inspection of the artwork. We cannot say that such a finding was clearly erroneous.

B. The Statutory Definition

A "work of visual art" is defined by the Act in terms both positive (what it is) and negative (what it is not). In relevant part VARA defines a work of visual art as "a painting, drawing, print, or sculpture, existing in a single copy" or in a limited edition of 200 copies or fewer. 17 U.S.C. § 101. Although defendants aver that elements of the work are not visual art, their contention is foreclosed by the factual finding that the work is a single, indivisible whole. Concededly, considered as a whole, the work is a sculpture and exists only in a single copy. Therefore, the work satisfies the Act's positive definition of a work of visual art. We next turn to the second part of the statutory definition—what is not a work of visual art.

The definition of visual art excludes "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work." 17 U.S.C. § 101. Congress meant to distinguish works of visual art from other media, such as audio-visual works and motion pictures, due to the different circumstances surrounding how works of each genre are created and disseminated. *See* H.R. Rep. No. 514

at 9. Although this concern led to a narrow definition of works of visual art,

> [t]he courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition. Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend on the medium or materials used.

Id. at 11.

"Applied art" describes "two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects." *Carter*, 861 F. Supp. at 315, *citing Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 997 (2d Cir. 1980). Defendants' assertion that at least part of the work are applied art appears to rest on the fact that some of the sculptural elements are affixed to the lobby's floor, walls, and ceiling—all utilitarian objects. Interpreting applied art to include such works would render meaningless VARA's protection for works of visual art installed in buildings. A court should not read one part of a statute so as to deprive another part of meaning. *See, e.g., United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2182 (1993); *United States v. LaPorta*, 46 F.3d 152, 156 (2d Cir. 1994).

Appellants do not suggest the entire work is applied art. The district court correctly stated that even if components of the work standing alone were applied art, "nothing in VARA proscribes protection of works of visual art that incorporate elements of, rather than constitute, applied art." 861 F. Supp. at 315. VARA's legislative history leaves no doubt that "a new and independent work created from snippets of

[excluded] materials, such as a collage, is of course not excluded" from the definition or a work of visual art. H.R. Rep. No. 514 at 14. The trial judge correctly ruled the work is not applied art precluded from protection under the Act.

III. Work Made for Hire

Also excluded from the definition of a work of visual art is any work made for hire. 17 U.S.C. § 101(B). A "work made for hire" is defined in the Copyright Act, in relevant part, as "a work prepared by an employee within the scope of his or her employment." *Id.* § 101(1). Appellants maintain the work was made for hire and therefore is not a work of visual art under VARA. The district court held otherwise, finding that the plaintiffs were hired as independent contractors.

A. Reid *Tests*

The Copyright Act does not define the terms "employee" or "scope of employment." In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), the Supreme Court looked to the general common law of agency for guidance. It held that a multi-factor balancing test was required to determine if a work was produced for hire (by an employee) or was produced by an independent contractor. *Reid*, 490 U.S. at 751. The Court elaborated 13 specific factors:

> the hiring party's right to control the manner and means by which the product is accomplished ... the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying

> assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751-52. While all of these factors are relevant, no single factor is determinative. *Id.* at 752. *See also Hilton International Company v. NLRB*, 690 F.2d 318, 321 (2d Cir. 1982). Instead, the factors are weighed by referring to the facts of a given case. *See Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

The district court determined that the sculpture was not "work for hire" and therefore not excluded from the definition of visual art. The *Reid* test is a list of factors not all of which may come into play in a given case. *See Aymes*, 980 F.2d at 861. The *Reid* test is therefore easily misapplied. We are usually reluctant to reverse a district court's factual findings as to the presence or absence of any of the *Reid* factors and do so only when the district court's findings are clearly erroneous. By contrast, the ultimate legal conclusion as to whether or not the sculpture is "work for hire" is reviewed *de novo*. The district court correctly stated the legal test. But some of its factual findings, we think, were clearly erroneous.

B. *Factors Applied*

The district court properly noted that *Aymes* established five factors which would be relevant in nearly all cases: the right to control the manner and means of production; requisite skill; provision of employee benefits; tax treatment of the hired party; whether the hired party may be assigned additional projects. *See* 980 F.2d at 861. Analysis begins with a discussion of these factors.

First, plaintiffs had complete artistic freedom with respect to every aspect of the sculpture's creation. Although the artists heeded advice or accepted suggestions from building engineers, architects, and others, such actions were not a relinquishment of their artistic freedom. The evidence strongly supports the finding that plaintiffs controlled the work's "manner and means." This fact, in turn, lent credence to their contention that they were independent contractors. *See Hilton*, 690 F.2d at 320. While artistic freedom remains a central factor in our inquiry, the Supreme Court has cautioned that "the extent of control the hiring party exercises over the details of the product is not dispositive." *Reid*, 490 U.S. at 752. Hence, resolving the question of whether plaintiffs had artistic freedom does not end the analysis.

The district court also correctly found the artists' conception and execution of the work required great skill in execution. Appellants' contention that the plaintiffs' reliance on assistants in some way mitigates the skill required for this work is meritless, particularly because each of the plaintiffs is a professional sculptor and the parties stipulated that professional sculpting is a highly skilled occupation. The right to control the manner and means and the requisite skill needed for execution of this project were both properly found by the district court to weigh against "work for hire" status.

The trial court erred, however, when it ruled that the defendants could not assign the artists additional projects. First, the employment agreement between SIG Management Company and the artists clearly states that the artists agreed not only to install the sculpture but also to "render such other related services and duties as may be assigned to [them] from time to time by the Company." By the very terms of the contract the defendants and their predecessors in interest had the right to assign other related projects to the artists. The district court incorrectly decided that this language supported

the artists' claim to be independent contractors. While the artists' obligations were limited to related services and duties, the defendants nonetheless did have the right to assign to plaintiffs work other than the principal sculpture.

Further, the defendants did, in fact, assign such other projects. The district court concedes as much, explaining that "plaintiffs did create art work on the property other than that in the Lobby." *Carter*, 861 F. Supp. at 319. The record shows the artists performed projects on the sixth floor of the building, on the eighth floor, and in the boiler room. Thus, on at least three different occasions the plaintiffs were assigned additional projects, which they completed without further compensation. The trial court suggests this fact "does not undermine plaintiffs' contention that they were hired solely to install art work on the Property." *Id.* We disagree. If the artists were hired to perform work other than the sculpture (as both their employment agreement and their actual practice suggests) then they were *not* hired *solely* to install the sculpture. It makes no difference that all work performed by the plaintiffs was artistic in nature. The point is that the performance of other assigned work not of the artists' choosing supports a conclusion that the artists were not independent contractors but employees.

We must also consider factors the district court correctly found to favor finding the sculpture to be work for hire. Specifically, the provision of employee benefits and the tax treatment of the plaintiffs weigh strongly in favor of employee status. The defendants paid payroll and social security taxes, provided employee benefits such as life, health, and liability insurance and paid vacations, and contributed to unemployment insurance and workers' compensation funds on plaintiffs' behalf. Moreover, two of the three artists filed for unemployment benefits after their positions were terminated, listing the building's management

company as their former employer. Other formal indicia of an employment relationship existed. For instance, each plaintiff was paid a weekly salary. The artists also agreed in their written contract that they would work principally for the defendants for the duration of their agreement on a 40-hour per week basis and they would only do other work to the extent that it would not "interfere with services to be provided" to the defendants. All of these facts strongly suggest the artists were employees.

Some of the other *Reid* factors bolster this view. The artists were provided with many (if not most) of the supplies used to create the sculpture. This factor was not, as the district court found, "inconclusive." The court also wrongly ruled that plaintiffs were hired for a "finite term of engagement." In fact, they were employed for a substantial period of time, their work continuing for over two years with no set date of termination (other than the sculpture's completion). Nor was the fact that the artists could not hire paid assistants without the defendants' approval "inconclusive" as the trial court erroneously found. Instead, this and the other just enumerated factors point towards an employer-employee relationship between the parties.

In reaching its conclusion, the district court also relied partly on the artists' copyright ownership of the sculpture, viewing such ownership as a "plus factor." We are not certain whether this element is a "plus factor," and therefore put off for another day deciding whether copyright ownership is probative of independent contractor status. Even were it to be weighed as a "plus factor," it would not change the outcome in this case.

C. *Employee Status*

Our review of the legal conclusion drawn from balancing the various *Reid* factors persuades us that the factors that

weigh in favor of finding the artists were employees outweigh those factors supporting the artists' claim that they were independent contractors. One of the factors that did not persuade us was the appellants' simplistic contention that usage of the words "employ" or "employment" in the agreements between the artists and SIG or the Limited Partnership establishes that the plaintiffs were employees. The use of these terms does not transform them into "magic words" imbued with legally controlling significance.

Again, we emphasize that despite the conclusion reached we do not intend to marginalize factors such as artistic freedom and skill, making them peripheral to the status inquiry. The fact that artists will always be retained for creative purposes cannot serve to minimalize this factor of the *Reid* test, even though it will usually favor VARA protection. Also, that the work was produced on the employer's premises is a necessary incident to all nonremovable art and therefore should not carry great weight. Similarly, we were not swayed by the boilerplate contract language or the accounting decision to deduct FICA taxes. To so read § 101 runs against the broad remedial purposes of VARA. As discussed earlier, the moral rights of the artist whose artistic work comes under VARA's umbrella are to be protected, not ignored, in light of Congress' pathbreaking legislation.

Moreover, because the *Reid* test is fact-dependent, future cases involving the work for hire question will not always fit neatly into an employee or independent contractor category. We also recognize that by counting indicia such as health insurance and paid vacations against the artists' independent contractor status, it may appear that artists regrettably are being forced to choose between the personal benefits inuring in an employment relationship and VARA's protection of the artists' work afforded only to independent contractors. Of

course, when an employer today denies an artist "basic attributes of employment" like vacation time or health benefits, such denial will be wholly inconsistent with a "work for hire" defense. *See Aymes*, 980 F.2d at 862-63.

Consequently, while the existence of payroll formalities alone would not be controlling, *see Reid*, 490 U.S. at 742 n.8, in combination with other factors, it may lead to a conclusion that a given work is one made for hire. Such other factors include: plaintiffs under their contract could be and were in fact assigned projects in addition to the work in the lobby; they were paid a weekly salary for over two years for a contracted 40 hours of work per week; they were furnished many of the needed supplies necessary to create the work; and plaintiffs could not hire paid assistants without defendants' consent. These factors, properly considered and weighed with the employee benefits granted plaintiffs and the tax treatment accorded them, are more than sufficient to demonstrate that the artists were employees, and the sculpture is therefore a work made for hire as a matter of law.

IV. Defendants' Counterclaim and Plaintiffs' Cross-appeal

Finally, since we have determined that the work is one made for hire and therefore outside the scope of VARA's protection, we need not discuss that Act's broad protection of visual art and the protection it affords works of art incorporated into a building. Also, as plaintiffs' sculpture was not protected from removal because the artists were employees and not independent contractors, we need not reach the defendants' Fifth Amendment takings argument.

Moreover, because the sculpture is not protected by VARA from removal resulting in its destruction or alteration, we do not address plaintiffs' contentions that VARA entitles them to complete the "unfinished" portion of the work, that

they are entitled to reasonable costs and attorney's fees, and that appellants tortiously interfered with the artists' contract with SIG and the Limited Partnership. Finally, the district court dismissed defendants' counterclaim against the artists for waste, finding, *inter alia*, that such a cause of action under New York law may only be brought by a landlord against a tenant. *See* 861 F. Supp. at 334-36. Appellants have failed to persuade us that it was error to dismiss this counterclaim.

CONCLUSION

Accordingly, the district court's order insofar as it held the work was one not made for hire is reversed and the injunction vacated. In all other respects, the order of the district court is affirmed. Each party to bear its own costs.

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Opinion of the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOHN CARTER, JOHN SWING and JOHN VERONIS,

Plaintiffs,

-against-

HELMSLEY-SPEAR, INC. and 474431 ASSOCIATES,

Defendants.

- X

OPINION & ORI
94 Civ. 2922 (DN

APPEARANCES: RICHARD A. ALTMAN, New York, New York, and HUGHES HUBBARD & REED, New York, New York (Charles Lozow, Daniel H. Weiner, John J. McGreevy, Patrick T. Perkins, of counsel), for plaintiffs;

DAVIDOFF & MALITO, New York, New York (Matthew Feigenbaum, Adrian Zuckerman, Robert C. Boneberg, Jill Rosenthal, John Harris, of counsel), for defendants.

EDELSTEIN, District Judge:

Plaintiffs bring this action to prevent the alteration or destruction of certain art work installed by them in the lobby of a commercial building located in Queens, New York, and

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to recover money damages, costs, and attorney's fees. Plaintiffs' first claim seeks relief pursuant to the Visual Artists Rights Act of 1990. This claim raises a number of issues of first impression. Plaintiffs' complaint, as amended by the Joint Pretrial Order ("JPTO")[1] (JPTO, at ¶ 1), also alleges willful infringement of copyright, and raises two supplemental state law claims, tortious interference with contract and unlawful ejection. Defendants raise a single counterclaim alleging waste.

On or around April 21, 1994, plaintiffs brought an order to show cause seeking a temporary restraining order to, among other things, prevent defendants from taking any action to alter, deface, modify, or mutilate plaintiffs' sculptures and installations located at 47-44 31st Street, Queens, New York. On April 25, 1994, this Court heard argument from both plaintiffs and defendants regarding plaintiffs' application for a temporary restraining order. On April 26, 1994, this Court issued a temporary restraining order enjoining defendants from (a) taking any action to alter, deface, modify, or mutilate plaintiffs' sculptures and installations located at 47-44 31st Street, Queens, New York; and (b) denying plaintiffs access to 47-44 31st Street, Queens, New York, Monday through Friday, between the hours of 12:00 p.m. and 5:00 p.m.[2]

1. Upon request of the parties, the Joint Pretrial Order was twice amended. See Carter v. Helmsley-Spear, Inc., 94 Civ. 2922 (DNE) (June 28, 1994 Memorandum Endorsement); Carter v. Helmsley-Spear, Inc., 94 Civ. 2922 (DNE) (July 7, 1994 Memorandum Endorsement).

2. On April 27, 1994, this Court received cross-requests from plaintiffs and defendants to modify the temporary restraining

(Footnote continued on next page)

On May 5, 1994, this Court commenced a hearing ("the preliminary injunction hearing") on plaintiffs' motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure ("Rule") 65. Plaintiffs sought an order enjoining defendants, during the pendency of this action, from "(a) taking any action to alter, deface, modify or mutilate plaintiffs' sculptures and installations located at 47-44 31st Street, Queens, New York; (b) taking any action to breach the agreements heretofore entered into between plaintiffs, Sig Management Company and 47-44 31st Association, L.P.; and (c) denying plaintiffs, their employees and invitees such access to the Property as had been enjoyed by them heretofore."

During the course of the preliminary injunction hearing, which commenced on May 5, 1994 and continued through May 13, 1994, this Court heard oral argument and received documentary evidence in support of, and in opposition to, plaintiffs' motion for a preliminary injunction. In addition, plaintiffs and defendants called both expert and fact witnesses. Pursuant to Rule 65(a)(2), all evidence received, and testimony adduced, at the preliminary injunction hearing is part of the record on the trial of this action.

On May 18, 1994, this Court filed an Opinion & Order, see Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228

(Footnote continued from previous page)

order issued by this Court on April 26, 1994. In a Memorandum & Order, dated April 28, 1994, this Court denied both plaintiffs' and defendants' requests for modification. See Carter v. Helmsley-Spear, Inc., 94 Civ. 2922 (DNE), 1994 U.S. Dist. LEXIS 5581 (S.D.N.Y. April 28, 1994).

(S.D.N.Y. 1994) ("May 18 Opinion"), granting in part and denying in part plaintiffs' motion for a preliminary injunction. In the May 18 Opinion, this Court ordered, inter alia, that "during the pendency of this action, defendants, their employees, and agents, are enjoined from (a) taking any action to alter, deface, modify, or mutilate plaintiffs' sculptures and installations located at 47-44 31st Street, Queens, New York; and (b) denying plaintiffs and their invitees access, between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, to the Lobby of 47-44 31st Street, Queens, New York for the purpose of viewing, photographing, or videotaping the Work." Id. at 239.

This Court tried this action without a jury over several days in June and July of this year. Plaintiffs and defendants each called both fact and expert witnesses, and offered into evidence portions of depositions and documentary evidence. Pursuant to Rule 52, this Opinion shall constitute the Court's written findings of fact and conclusions of law.

BACKGROUND

Plaintiff John Meade Swing is a sculptor and an artist who has held public exhibitions of his original works of art since 1984. (HTr.[3], at 18-19; UF[4] 1). Mr. Swing is also licensed by the City of New York as a structural steel welder.

3. "HTr." refers to the hearing transcript. "TTr." refers to the trial transcript.

4. "UF" refers to a fact stipulated to by the parties in the Joint Pretrial Order. The number following the designation "UF" identifies the location of the stipulated fact within paragraph five of the Joint Pretrial Order.

(HTr., at 21; UF 1). Plaintiff John James Veronis, Jr. is an artist and a sculptor who supports himself through his artistic endeavors. (HTr., at 30; UF 2). Plaintiff John Francis Carter also is a professional artist and sculptor. (HTr., at 37, 39; UF 3). Plaintiffs work as partners to create sculptures and other works of art. Collectively, plaintiffs are known as the "Three-Js," or "Jx3." (HTr., at 60; UF 4).

Defendant 474431 Associates ("Associates") is the owner of a building located at 47-44 31st Street, Queens, New York ("the Property"). Associates has owned the Property since June 1978. (UF 5). The General Partners of Associates are Alvin Schwartz and Supervisory Management Corp. (UF 5). All of the shares of Supervisory Management Corp. are owned by Helmsley Enterprises, Inc. (UF 5). Defendant Helmsley-Spear, Inc. became the managing agent of the Property for its disclosed principal, Associates, on April 6, 1994. (UF 6). Alvin Schwartz is, and during all periods of time relevant to this action has been, an employee of Helmsley-Spear, Inc. (UF 6). Thomas Schwartz is, and during all periods of time relevant to this action has been, an employee and officer of Helmsley-Spear, Inc. (UF 6; TTr., at 222).

On February 1, 1990, 47-44 31st Street Associates, L.P. ("the Limited Partnership") entered into a net lease agreement ("the Net Lease") with Associates to lease the Property. (JPTO, at ¶ 5(d); DExh.[5] BBB). From February 1, 1990 until June 1993, Irvin Cohen, or an entity controlled by him, was the general partner of the Limited Partnership. (UF

5. "DExh." refers to exhibits moved into evidence by defendants. "PExh." refers to exhibits moved into evidence by plaintiffs.

9). During this period, Corporate Life Insurance Company ("Corporate Life") was a limited partner in the Limited Partnership. (UF 10). From February 1, 1990 to June 1993, Sig Management Company ("Sig") was the managing agent of the Property for the Limited Partnership. (UF 16). Mr. Cohen controlled Sig and personally was responsible for managing the Property on behalf of Sig and the Limited Partnership from February 1, 1990 until June 1993. (UF 16).

By an agreement dated December 16, 1991 ("the Contract"), plaintiffs contracted with Sig "to design, create and install sculpture and other permanent installations" in the lobby ("the Lobby") and other areas of a building located at 47-44 31st Street, Queens, New York. (DExh. NN; UF 21-27). Under the terms of the Contract, Sig granted plaintiffs "full authority in design, color and style" of the art work to be installed, but retained the authority to direct the location of the installations within the confines of the Property. The Contract provides that plaintiffs are entitled to "receive design credit" for their sculptures and installations and own the copyright to the these sculptures and installations. (DExh. NN; UF 26). Sig was to receive fifty percent of any proceeds earned from the exploitation of this copyright. (DExh. NN). On January 20, 1993, Sig and plaintiffs signed an agreement that extended the duration of the Contract, without material alteration, for an additional year. (DExh. OO).

In or around June 1993, Corporate Life became the general partner of the Limited Partnership. (UF 12). From June 1993 until April 6, 1994 Corporate Life acted as managing agent for the Property and Theodore Nearing of Corporate Life assumed Mr. Cohen's responsibility for managing the Property. (UF 17). In July 1993, the Limited Partnership assumed the Contract, as extended. (UF 116).

On December 29, 1993, Mr. Nearing transmitted a letter to plaintiffs that, with the exception of discontinuing the provision of certain benefits, once again extended the Contract without material alteration. (DExh. B; JPTO, at ¶ 5(h))).

Pursuant to the Contract and subsequent extensions thereof, plaintiffs were each paid $1,000 weekly by Sig from December 1991 until July 1993. (HTr., at 27; UF 29, 30). From July 1993 until April 6, 1994, plaintiffs were each paid $1,000 weekly by the Limited Partnership. (HTr., at 28; UF 31, 32). Throughout this period, plaintiffs continually created art work in the Lobby. (HTr., at 34).

The Net Lease was terminated on March 31, 1994 (UF 19), and the Limited Partnership filed for protection under Chapter 7 of the United States Bankruptcy Code on April 8, 1994 (UF 14). On April 7, 1994, defendants' agents ordered plaintiffs to leave the Property and told plaintiffs that they would be deemed trespassers if plaintiffs subsequently returned to the Property. (UF 109; TTr., at 245-46). At this time, defendants' agents also made certain statements that led plaintiffs to believe that defendants intended to alter or remove the art work installed in the Lobby. Thereafter, this action commenced.

DISCUSSION

I. PLAINTIFFS' FIRST CLAIM FOR RELIEF: THE VISUAL ARTISTS RIGHTS ACT OF 1990

Plaintiffs' first claim for relief is based upon the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 101 et seq. (JPTO, at ¶ 4(a)(1)). VARA amends the Copyright Act. In passing VARA, Congress for the first time provided for protection of artists' "moral rights" under the Copyright Act. See Jane C. Ginsburg, Copyright in the 101st Congress:

Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990, 14 Colum.-VLA J.L. & Arts 477, 478 (1990) [hereinafter "Ginsburg"]. "[M]oral rights afford protection for the author's personal, non-economic interests in receiving attribution for her work, and in preserving the work in the form in which it was created, even after its sale or licensing." Id. (footnote omitted); see William F. Patry, Copyright Law and Practice, Ch. 14, at 1021; see also H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 5, reprinted in, 1990 U.S.C.C.A.N. at 6915.

17 U.S.C. § 106A(a)(3) provides that the author of a work of visual art,

> subject to the limitations set forth in section 113(d), shall have the right--
>
> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
>
> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

A "work of visual art" is defined to include paintings, drawings, prints, and sculptures, existing in a single copy or in limited edition. 17 U.S.C. § 101. Works made for hire, works of applied art, and works not otherwise subject to copyright protection such as strictly utilitarian objects, are excluded from this definition. Id. The rights delineated in 17 U.S.C. § 106A(a)(3) subsist for the life of the last surviving author of a work created by more than one artist. 17 U.S.C. § 106A(d)(3).

The limitations set forth in 17 U.S.C. § 113(d), which are referenced in 17 U.S.C. § 106A(a)(3), are as follows:

> (d) (l) In a case in which--
>
> (A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and
>
> (B) the author consented to the installation of the work in the building either before the effective date . . . of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,
>
> then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.
>
> (2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless--
>
> (A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or
>
> (B) the owner did provide such notice in writing and the person so notified failed, within 90 days after

receiving such notice, either to remove the work or to pay for its removal.

A. "Work of Visual Art"

i. Evaluation of Whether Plaintiffs' Art Work is a Single Work ofArt or Several Works of Art

The first question that must be examined is whether plaintiffs' sculptural installations in the Lobby[6] constitute a single work of art or instead are several discreet works of art that must be treated separately under VARA. The art work in the Lobby consists of a number of sculptural elements including art work attached to the ceiling and the floor, interactive art, a vast mosaic covering the majority of the floor of the Lobby and portions of walls and several sculptural elements, and the interior of three elevators that open into the Lobby. For the reasons discussed below, I find that, with the exception of certain items described below, the art work in the Lobby is a single work of art whose elements are interrelated ("the Work").

Plaintiffs consider the Work to be a single work of art. (TTr., at 116, 147). At the preliminary injunction hearing, Mr. Carter testified that "all of these pieces are interrelated and to remove one contaminates the meaning of the whole piece. It would be like removing part of a painting or the hands from a portrait because we consider this to be one

6. Although plaintiffs created art work in areas of the Property other than the Lobby, protection of that art work is not at issue in this case. Accordingly, only the art work located in and around the Lobby will be discussed.

work." (HTr., at 60). Although he obviously has an interest in the outcome of this litigation, I found Mr. Carter to be a credible and sincere witness and I credit this testimony. Mr. Carter's testimony was bolstered by the testimony of the other plaintiffs and by that of expert witnesses called by plaintiffs. For example, plaintiffs called Professor Aedwyn Darroll to testify as an expert in sculpture and other visual art. Professor Darroll has taught two- and three-dimensional design (including sculpture) for more than twenty years (TTr., at 180) and currently teaches at the Parson School of Design and at the Fashion Institute of Technology in New York City (TTr., at 180-81). Professor Darroll testified that the elements of the Work are interrelated. (TTr., at 184-85). I found Professor Darroll to be a well-qualified and credible witness.

In addition, the method by which plaintiffs created the Work supports a finding that the Work is a single work of art. Before a sculptural element was built and installed, plaintiffs conferred to determine whether it would "work well" with the other elements. (TTr., at 114). According to plaintiffs, each sculptural element was "determined very much by the element that [came] before it and these things mesh together." (TTr., at 161).

Other evidence adduced at the preliminary injunction hearing and during the trial also supports plaintiffs' contention that the Work is a single work of art and that the various sculptural elements are interrelated. The Work is composed of several sculptural and other elements that appear to form an integrated whole. (HTr., at 52-83; PExh. 7, 8-31). For example, tile is attached to the floor and walls to form a vast mosaic. This mosaic is interrelated with sculptural elements that adorn the floor, walls, and ceiling of the Lobby. (See, e.g., HTr., at 55, 63, 79; PExh. 7, 23). The mosaic contains words and phrases that correspond to

sculptural elements located on the ceiling and walls. (See, e.g., HTr., at 57; PExh. 7). Several interactive pieces depend for their meaning on neighboring sculptural elements, as well as on phrases and representations depicted in the mosaic tile. (See, e.g., HTr., at 57-58; 62-64). In sum, the various sculptural elements appear to be interrelated--rather than distinct works of art that could be separated from the remainder of the Work without losing their meaning.

The Work is also thematically consistent. A primary motif of the Work is recycling. Most of the materials used to make the Work are themselves recycled matter: the floor and wall mosaic is composed of tiles manufactured from recycled glass; most of the sculptural elements are built from discarded objects;[7] and other sculptural elements were created from objects previously owned by tenants of the Property and given to plaintiffs. Various representations, including a statement incorporated in the floor mosaic, "DO YOU REMEMBER WATER," which flows from a depiction of a giant mouth surrounding an elevator, attempt to highlight the negative societal impact of the failure to recycle. A similar example of this is found on the ceiling: Plaintiffs have crafted and hung various sculptural elements that represent "space junk." Viewed in context this particular sculptural element portrays the danger of dumping refuse into space.

7. Although certain sculptural elements were constructed using new material, such as stock steel, these elements are thematically consistent because even these elements have the appearance of having been crafted from recycled material.

In sum, this Court heard testimony that the elements of the Work are interrelated, the Work appears to be interrelated, and the Work is thematically consistent. In addition, upon the request of the parties, this Court conducted an inspection of the art work in the Lobby on July 14, 1994. This Court's inspection of the art work supported evidence in the record that the Work is a single work of art. Accordingly, I credit plaintiffs' contention that the Work is a single work of art, and find that the Work must be considered as a single work of art.

Plaintiffs did not show, however, that several items described in the Joint Pretrial Order (JPTO, at ¶ 5(f)), the "building directory," the "entrance steps 31st Street entrance," and the ceiling and wall lighting (with the exception of lighting elements directly incorporated into the Work such as "the chandelier," "the florescent snake," the "illuminated floor placque," and lighting elements incorporated into various sculptural elements such as the headlights of the bus) are part of, or integrated in, the Work. Accordingly, these items will be discussed separately.

ii. Applied Art

Defendants argue that the Work is not entitled to protection under VARA because it incorporates elements that they describe as "applied art." The term "applied art" describes two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects. See, e.g., Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 997 (2d Cir. 1980). Works of applied art are not "works of visual art" as defined by VARA, see 17 U.S.C. § 101, and therefore are not protected thereunder.

The Work is a single work of art. Even examined individually, however, the vast majority of the Work's sculptural elements cannot reasonably be described as

applied art. Sculptural elements affixed to the ceiling, for example, serve absolutely no utilitarian purpose. These elements do not automatically become applied art merely because the ceiling to which they are attached is a utilitarian object. Such a result would render VARA nonsensical in light of the fact that VARA protects works of visual art that are permanently installed in buildings. Presumably, any part of a building to which such visual art is affixed serves some utilitarian purpose.

Moreover, nothing in VARA proscribes protection of works of visual art that incorporate elements of, rather than constitute, applied art. Indeed, the legislative history of VARA indicates that Congress intended that a work of art can be a "work of visual art" as defined by VARA even if it incorporates elements of applied art. See H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 13-14, reprinted in, 1990 U.S.C.C.A.N. at 6923-24 ("[A] new and independent work created from snippets of these materials, such as a collage, is of course not excluded."). "The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition" of works of visual art. H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 11 (1990), reprinted in, 1990 U.S.C.C.A.N. at 6921. While plaintiffs arguably may have incorporated sculptural elements that, if viewed alone, could be defined as applied art, I find that the Work as a whole clearly is not applied art. Thus, protection of the Work is not proscribed.

The same cannot be said of the "building directory," the "entrance steps 31st Street entrance," and the ceiling and wall lighting (with the exceptions noted above, see supra p. 13). These items clearly are works of applied art or strictly utilitarian objects. Hence, these items are not works of visual art and are not protected by VARA.

iii. "Work Made For Hire"

Defendants argue that the Work is a work made for hire. As discussed above, works made for hire are specifically excluded from the definition of works of visual art. 17 U.S.C. § 101 defines a "work made for hire" in pertinent part as

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

It is undisputed that the second part of the definition quoted above does not apply to this case. Accordingly, defendants' argument that the Work was made for hire raises the question of whether plaintiffs were employees of the entities that commissioned the Work and, if they were, whether the Work was prepared within the scope of their employment.

The Copyright Act does not define the terms "employee" or "employment" and, therefore, "the application of these terms is left to the courts." Aymes v. Bonelli, 980 F.2d 857, 860 (2d Cir. 1992). In Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), the Supreme Court examined the legislative history of the Copyright Act and concluded that in order to "determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor." 490 U.S. at 751. The Reid Court then

enumerated factors relevant to the consideration of whether or not a hired party who creates a copyrightable work is an "employee" or an "independent contractor" for purposes of evaluating whether a given work is a "work made for hire." Factors relevant to this inquiry include

> the hiring party's right to control the manner and means by which the product is accomplished; . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

490 U.S. at 751-52 (footnotes and citations omitted). The Reid Court noted that "[n]o one of these factors is determinative." Id. at 752.

In Aymes v. Bonelli, 980 F.2d 857 (2d Cir. 1992), the Second Circuit Court of Appeals reviewed the Reid factors and discussed the weight to be accorded certain factors. The Aymes Court first noted that, under Reid, "[i]t does not necessarily follow that because no one factor is dispositive all factors are equally important, or indeed that all factors will have relevance in every case." Aymes, 980 F.2d at 861. "The factors should not merely be tallied but should be weighed according to their significance in the case." Id. "[T]he Reid test was not intended to be applied in a mechanistic fashion," but rather each of the factors must be considered in light of its relative importance in the case. Id. at 862.

The Second Circuit found, however, that certain factors "will be significant in virtually every situation." Id. at 861. These factors include:

> (1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.

Id. Thus, the Court will begin consideration of whether plaintiffs were employees at the time they created the Work with an analysis of these five factors.

1. The Reid Factors Emphasized in Aymes

a. The Right to Control

Sig, Corporate Life, and the Limited Partnership did not have the right to control the manner and means by which the Work was created, nor did these entities dictate the shape or style that the Work would take. Under the terms of the Contract, plaintiffs had "full authority in design, color and style" with regard to the Work. (DExh. NN). The only limitation placed on plaintiffs by the Contract was that the hiring party retained the authority to direct the location of the Work within the confines of the Property. (DExh. NN; HTr., at 195). As adduced at the trial and the preliminary injunction hearing, this limitation took the form of requiring plaintiffs to construct art work primarily within the Lobby. (See, e.g., HTr., at 43-44).

Theodore Nearing, who was in charge of Property-related issues on behalf of Corporate Life and ultimately assumed Mr. Cohen's responsibility for managing the Property, testified that neither he, nor Corporate Life, had any input with respect to the design of the art work in the Lobby. (HTr., 195, 238). Mr. Nearing further testified that, to the

best of his knowledge, Sig did not have any input with respect to the design or placement of the art work in the Lobby. (HTr., 195). I found this testimony to be credible.

Plaintiffs also testified that they had complete artistic freedom regarding the manner and means by which the Work was created. At the preliminary injunction hearing, Mr. Veronis testified that it was his understanding that the artists were retained to "make sculptures and install them in the lobby of the building. And it was our decision as to what these sculptures might look like and might appear to be. And we were at liberties to create them and put them up throughout the lobby area of the building." (HTr., at 33). At the time they were retained, plaintiffs understood that they were commissioned to design a lobby that would be a "museum" of their original art work. (HTr., at 21, 39-40). I credit this testimony.

Defendants failed to controvert plaintiffs' evidence on this point. One witness, Mr. Cohen, testified that he "dictated" what he wanted plaintiffs to do in creating the Work. (TTr., at 349). I did not find Mr. Cohen to be a credible witness. As an initial matter, Mr. Cohen's demeanor on the witness stand undermined his credibility. Second, Mr. Cohen's testimony at trial that he dictated the manner in which the Work was created is contradicted by his prior deposition testimony on this point (See, e.g., TTr., at 541-44, 552). Third, Mr. Cohen's contention that he could dictate to the artists is intrinsically questionable in light of his testimony that, although he made several suggestions to plaintiffs, these suggestions were largely ignored and he never took any action to force compliance with his suggestions. (TTr., at 531-36). Fourth, it became apparent at trial that Mr. Cohen might be sympathetic to defendants' position in this litigation because he is aware that he may be sued by defendants for the actions that he took in relation to

the Work should plaintiffs prevail in this action. (TTr., at 519-20, 528). Hence, I do not credit Mr. Cohen's testimony that he "dictated" to plaintiffs regarding the Work.

At trial it also was adduced that certain persons suggested alterations to the Work for safety, aesthetic, and pragmatic reasons. Similarly, the tenants of the building made suggestions concerning the Work, some of which were adopted by plaintiffs. I have considered this testimony and evidence and do not find that it materially limited plaintiffs' artistic freedom. Plaintiffs were open to suggestions by various persons, occasionally adopted those suggestions, and attempted to heed advice that would ensure that the Work was safe, lasting, and aesthetically pleasing. In sum, taken as a whole the record demonstrates that plaintiffs had virtually unfettered discretion in creating the Work.

In their post-trial submissions to this Court, defendants refer to plaintiffs' artistic freedom as "the phony factor." Defendants' Post-Trial Memorandum of Law, at 11. Defendants contend that the Court should give little weight to the issue of plaintiffs' artistic freedom, and argue that even if this Court does consider it, it is of no relevance. While defendants seem to concede that plaintiffs possessed significant artistic freedom, they argue that this freedom "was emblematic of [plaintiffs'] employment as professional artists." Id. The record does not support defendants' contention in this regard, however. Defendants apparently believe that every time one hires a professional artist, one must necessarily direct that artist to "create" and nothing more. This view is wholly without merit. One can easily postulate a situation in which a person or entity employs a professional artist for a specific chore and makes as a condition of employment compliance with certain artistic directions, i.e. to sculpt a five-foot tall rendition of corporate headquarters from marble, the same material from which the

real headquarters building was constructed. This was not the case here.

In the instant case, I find that plaintiffs had unfettered artistic freedom to create the Work and that the hiring party did not have the right to control the manner and means of creation. I further find that, on the facts of this case, plaintiffs' artistic freedom strongly supports plaintiffs' contention that they were independent contractors rather than employees of Sig or the Limited Partnership.

b. The Level of Skill

The level of skill necessary to create the Work is highly relevant to the consideration of whether or not plaintiffs were employees or independent contractors. Plaintiffs are artists and sculptors, which, as numerous courts have recognized, are highly skilled occupations. See, e.g., Reid, 490 U.S. at 752. The parties to this action have stipulated that "[p]rofessional sculpting is a highly skilled occupation" (UF 4), and that each plaintiff is a professional sculptor (UF 1-3).

Defendants contend, however, that the creation of certain elements of the Work would not have required great artistic skill. Further, defendants argue that because plaintiffs delegated certain tiling work to others (UF 63), plaintiffs cannot be said to have required great skill to create the mosaic. I find these contentions to be without merit.

As discussed above, the Work is a single work of art. Plaintiffs conceived the design, created the art work, and executed the construction thereof. This entire process clearly required great skill. The use of paid and unpaid assistants working at plaintiffs' behest and under their direct supervision does not in any way demonstrate that plaintiffs did not require skill to create the Work.

I find that a high degree of skill was required to create the Work. I further find that this factor strongly supports

plaintiffs' contention that they were independent contractors rather than employees.

c. The Provision of Benefits to, and the Tax Treatment of, the Hired Parties

It is undisputed that Sig and/or the Limited Partnership provided health and insurance benefits to plaintiffs through December 31, 1993. (HTr. 290-92, 295; UF 39-44; DExh. B). Thereafter, plaintiffs continued to work on the Work without the provision of such benefits. (HTr., at 290-92; UF 45). It is also undisputed that in 1991, 1992, and 1993 plaintiffs received W-2 forms from either Sig or the Limited Partnership (UF 38), and that taxes were withheld from payments made to plaintiffs during this period (UF 33).

The provision of benefits to, and the tax treatment of, plaintiffs in this case supports defendants' contention that plaintiffs were employees. This factor is not determinative, however, especially in light of the fact that plaintiffs continued to work on the Work once the provision of benefits had ceased.

d. The Right To Assign Additional Projects

"[I]ndependent contractors are typically hired only for particular projects." Aymes, 980 F.2d at 863. Hence, when a hired party is hired to participate in numerous unspecified chores at the hiring party's discretion the hired party is likely to be an employee; conversely, when a hired party is hired to complete or achieve a specific task, it is more likely that the hired party is an independent contractor. In the instant case, the record supports plaintiffs' contention that plaintiffs were

hired to complete a specific task, namely installing art on the Property.

As an initial matter, the Contract provides that plaintiffs were hired "to design create and install sculpture and other permanent installations ('the Sculptures') in The Factory[8] and to render such other related services and duties as may be assigned to you from time to time . . . ." (DExh. NN) (emphasis added).

Defendants do not contest that plaintiffs' sole responsibility was to install art work; instead they point to art work created by plaintiffs on the Property in places other than the Lobby and argue that these installations constitute projects separate from that undertaken by plaintiffs in the Lobby. While defendants' contention in this regard is true--plaintiffs did create art work on the Property other than that in the Lobby--it clearly does not undermine plaintiffs' contention that they were hired solely to install art work on the Property, nor does it show that plaintiffs were employees.

Moreover, the record suggests that neither plaintiffs, Sig, nor the Limited Partnership viewed plaintiffs as employees who could be directed to complete tasks other than the installation of art work on the Property. For example, testimony adduced at trial showed that, on at least one occasion, plaintiffs were directed to complete a chore in another building. (TTr., at 347-48). Although plaintiffs refused to undertake this chore, they were not terminated, their pay was not docked, and they were not otherwise penalized for this failure to undertake another unrelated

8. The Property was consistently referred to by plaintiffs, Sig, and the Limited Partnership as "The Factory."

project. (TTr., at 347-48). In addition, while it is undisputed that one of the plaintiffs was a licensed structural steel welder during the relevant period of time, there is no evidence that he was ever asked to employ his welding skills to complete a project other than the art work.

Thus, I find that Sig, Corporate Life, and the Limited Partnership did not have the authority to direct plaintiffs to perform tasks other than the one they were hired to complete--the installation of art work on the Property. This factor weighs in favor of a finding that plaintiffs were independent contractors.

2. Other Reid Factors

Having examined the factors emphasized by the Second Circuit in Aymes, this Court must now consider the remaining Reid factors: (1) the source of the instrumentalities and tools; (2) the location of the work; (3) the duration of the relationship between the parties; (4) the extent of the hired party's discretion over when and how long to work; (5) the method of payment; (6) the hired party's role in hiring and paying assistants; (7) whether the work is part of the regular business of the hiring party; and (8) whether the hiring party is in business. The Court will examine each of these factors, and the relevance of each to this case, in turn.

The source of instrumentalities and tools is wholly inconclusive in the instant case. On the one hand, Sig and/or the Limited Partnership provided plaintiffs with certain tools and raw materials. (UF 53-56). On the other hand, plaintiffs also used their own tools in creating the Work, incorporated many "found" objects in the Work, and incorporated thousands of dollars worth of raw material into the Work for which they did not seek or receive reimbursement. (UF 52, 54, 57; HTr., at 458). Because I find that plaintiffs, Sig, and

the Limited Partnership all provided the instrumentalities and tools used to create the Work, this factor is inconclusive in this case.

The location of the work also is not a helpful consideration in the instant case. While it appears from the record that some of the work occurred off the Property, the nature of the work that plaintiffs did required the majority to be done on site. Regardless of whether plaintiffs were independent contractors or employees, this work would have had to be done at the Property. Accordingly, the location of the work does not illuminate plaintiffs' status.

The duration of the relationship between plaintiffs on the one hand, and Sig and the Limited Partnership, on the other, strongly supports plaintiffs' contention that they were not employees of these entities. As this Court previously noted, plaintiffs "were not prior employees of [Sig or the Limited Partnership], nor would they be employed by [these entities] upon completion of the Work." Carter, 852 F. Supp. at 234. Defendants have failed to offer any evidence showing that plaintiffs would, in fact, have been retained by the hiring party following the completion of the Work. This finite term of engagement, i.e. engagement defined temporally in terms of the duration of a single project, is characteristic of a principal-independent contractor relationship.

The extent of the hired party's discretion over when and how long to work likewise weighs in favor of plaintiffs' contention that they were hired as independent contractors to create the Work. Plaintiffs "were required 'to work approximately forty (40) hours per week' at the Property." (UF 23). From the record, however, this number seems to have had little meaning in this case. At the preliminary injunction hearing, plaintiffs proved that they had unrestricted 24-hour access to the Property, and often worked far in excess of the minimum number of hours contractually

required of them. (UF 45-46; HTr. 21, 34, 85). When plaintiffs worked in excess of forty hours, their pay was not increased; when they worked less than forty hours, it was not diminished. (UF 45). Moreover, plaintiffs had no set hours and could and did work on the Work at times of their own choosing.

The method of payment, weekly checks in the amount of $1,000 to each of plaintiffs, is characteristic of an employer-employee relationship. Plaintiffs argue, however, that this sum in fact represents a lump sum payment apportioned over time. While plaintiffs' contention has some merit in light of the testimony and evidence in the record regarding how this method of payment was arrived at (HTr., at 459-60, 462, 469; UF 20), on the whole the record does not demonstrate that the weekly payments were intended as a lump sum payment apportioned over time. This contention is undermined by (l) the fact that the completion date for the Work was unspecified, and (2) plaintiffs' failure to prove that these payments were made toward a sum certain agreed to by the hiring and hired party in advance. On the record before the Court, then, this method of payment tends to support defendants' contention that plaintiffs were employees.

The hired party's role in hiring and paying assistants is not a helpful consideration in this case. Plaintiffs had complete discretion to retain unpaid assistants. Moreover, plaintiffs were responsible for selecting all assistants--paid and unpaid--whose only role was to assist plaintiffs. (UF 58). Thus, plaintiffs also had significant discretion with regard to the employment of paid assistants. Plaintiffs could not hire paid assistants, though, without the approval of Sig or the Limited Partnership (UF 59), and these paid assistants were paid directly by Sig or the Limited Partnership (UF 60; TTr., at 594). Finally, Mr. Veronis was responsible for

overseeing both paid and unpaid assistants that worked exclusively for plaintiffs. (TTr., at 595).

This factor is indeterminate because this factual scenario could be characteristic of a situation involving either employees or independent contractors. Plaintiffs' discretion to employ unpaid assistants, and their control over the selection of their paid assistants, is characteristic of an independent contractor retaining assistants. The requirement that plaintiffs obtain the approval of Sig or the Limited Partnership to hire paid assistants, and the fact that these paid assistants were paid by Sig or the Limited Partnership, could be characteristic of an employer exercising control over the retention and remuneration of lower-level employees, or of a principal exercising control over expenses in order to prevent cost overruns in connection with a project undertaken by an independent contractor. Plaintiffs' supervisory responsibility concerning their assistants is irrelevant to this Court's analysis, because this responsibility could attach either in the context of an independent contractor supervising assistants or an employee supervising lower-level employees. Thus, the hired party's role in hiring and paying assistants is wholly indeterminate in the instant case.

The final Reid factors that this Court must consider are whether the hiring party is in business and whether the Work is the type of work created in the regular course of the hiring party's business. The former factor "will always have very little weight in this analysis," Aymes, 980 F.2d at 863, and is not helpful in the instant case. With regard to whether creating the Work was part of the regular business of the hiring party, defendants strain to argue that it was, because

prior to hiring plaintiffs, Mr. Cohen allegedly had attempted to use art to entice persons to become tenants of buildings that he owned or managed. See Defendants' Post-Trial Memorandum, at 28.[9] This contention is devoid of merit. "The purpose of this factor is to determine whether the hired party is performing tasks that directly relate to the objective of the hiring party's business." Aymes, 980 F.2d at 863. Even assuming that Mr. Cohen had used art to entice tenants in the past (UF 15), the evidence in the record does not support defendants' apparent belief that plaintiffs were performing tasks that were directly related to the hiring party's business. As in Reid where "[c]reating sculptures was hardly 'regular business' for CCNV," 490 U.S. at 753, it is clear in the instant case that creating works of visual art was hardly "regular business" for either Sig or the Limited Partnership. Accordingly, this factor weighs in favor of a finding that plaintiffs were hired as independent contractors.

3. A Plus Factor: Ownership of Copyright

Generally when the Court is called upon to determine whether a hired party is an "employee" or an "independent contractor" under the Copyright Act, the purpose of that inquiry is to ascertain copyright ownership in a copyrightable work. If the Court determines that the hired party is an "employee," the copyright in the copyrightable work produced belongs to his or her employer. See 17 U.S.C. § 201(b). Conversely, if the Court finds that the hired party is

9. As previously noted, I did not find Mr. Cohen to be a credible witness. Accordingly, the Court does not credit his testimony concerning his prior installation of art work in properties that he owned or managed.

an "independent contractor," the copyright belongs to the hired party.

The operative theory incorporated in the Copyright Act is that, when a party hires an employee to create a copyrightable work, the fruits of the employee's endeavors properly belong to the employer. The employer's mandate to the employee, and the scope of the employee's employment, contemplate the creation of copyrightable material for the employer's benefit.

Under VARA, however, the "work made for hire" analysis is undertaken for a different purpose: The hired party's employment status is analyzed to ascertain whether a work created by that party may be considered a "work of visual art." As such, it is logical to consider copyright ownership when the "work made for hire" analysis is necessary in an action seeking protection of a work of art under VARA. Among other things, this analysis, if helpful in a given case, can assist the Court in ascertaining how the interested parties viewed their own relationship.

As already discussed, the Contract provides that plaintiffs "shall retain copyrights" to the Work. (DExh. NN). I find that this factor is relevant to an analysis of plaintiffs' status in this case and that it supports a finding that plaintiffs were independent contractors rather than employees.

4. Conclusion: The Work is Not a "Work Made For Hire"

The factors that are significant in the instant case are: (1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits to, and the tax treatment of, the hired party; (4) whether the hiring party had the right to assign additional projects to the hired party; (5) the duration of the relationship between the parties; (6) the extent of the hired party's

discretion over when and how long to work; (7) the method of payment; and (8) whether creating the Work was part of the regular business of the hiring party. In addition, another factor, ownership of copyright, also is significant in this case. Other factors enumerated in Reid are indeterminate and irrelevant on the facts of this case: (1) the source of the instrumentalities and tools; (2) the location of the work; (3) the hired party's role in hiring and paying assistants; and (4) whether the hiring party is in business.

The tax treatment of plaintiffs and the method of payment support defendants' contention that plaintiffs were employees at the time the Work was created. The provision of benefits to plaintiffs also supports defendants' contention in this regard, but this factor's weight is diminished by the fact that both the hiring party and the hired parties appear not to have considered this a material condition of their business relationship: The Limited Partnership ultimately discontinued this practice and plaintiffs neither objected nor ceased construction of the Work.

I find that these factors are greatly outweighed by the remaining factors that are relevant in this case. Plaintiffs had autonomy to control the manner and means of creation, were skilled artisans who employed their considerable skill in creating the Work, were not subject to assignment of projects unrelated to that which they were hired to accomplish, had no prior relationship with the hiring party and would work for the hiring party only until the completion of the project, had significant discretion to determine when and how long to work, and the creation of works of art was not part of the hiring party's regular business nor a pursuit necessary to the accomplishment of the hiring party's business objectives.

On this basis alone, this Court must find that plaintiffs were independent contractors rather than employees. This finding is bolstered by a plus factor: Plaintiffs own the

copyright to the Work. This indicates that the hiring and hired parties considered plaintiffs to be independent contractors. Accordingly, I find that plaintiffs were not employees at the time the Work was created and that the Work is not a "work made for hire" as that term is defined in the Copyright Act.

iv. A "Work of Visual Art"

As already discussed, VARA defines a "work of visual art" as:

> a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.

17 U.S.C. § 101. Plaintiffs have demonstrated that the Work is a single sculpture that incorporates elements drawn from other media. There is only one copy of this sculpture, which is located in the Lobby. The Work is not a "work made for hire" or "applied art," and is otherwise copyrightable. The Work was created and installed after the effective date of VARA. Accordingly, because it fits the definition of a "work of visual art" enunciated in 17 U.S.C. § 101, the Work is entitled to treatment under VARA as a work of visual art.

B. 17 U.S.C. § 106A(a)(3)(A): Prejudice to Plaintiffs' Honor or Reputation

Having found the Work to be a work of visual art, the Court must consider whether "intentional distortion, mutilation, or modification" or the Work would be "prejudicial to [plaintiffs'] honor or reputation." 17 U.S.C. §

106A(a)(3)(A). VARA, however, does not define the terms "prejudicial," "honor," or "reputation." Thus, the Court must construe these terms.

"It is axiomatic that 'the starting point in every case involving construction of a statute is the language itself.'" Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); see also Samuels Kramer & Co. v. Commissioner, 930 F.2d 975, 979 (2d Cir.) (same), cert. denied, 112 S.Ct. 416 (1991). "The plain meaning of the statute's language should control except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" Samuels, Kramer & Co., 930 F.2d at 979 (quoting Griffen v. Oceanic Contractors Inc., 458 U.S. 564, 571 (1982)). "In such cases it is the intention of the legislators, rather than the strict language, that controls." Id. Finally, "'in expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" Id. (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).

Applying these principles to VARA, it is apparent that the terms "prejudicial," "honor," and "reputation" have readily understood meanings. "Prejudice" is commonly understood to mean "injury or damage due to some judgment of another." Webster's Third New International Dictionary (unabridged) 1788 (1971). "Honor" is commonly understood to mean "good name or public esteem." Id. at 1087. "Reputation" is commonly understood to mean "the condition of being regarded as worthy or meritorious." Id. at 1929. Use of these definitions will not cause a result that runs contrary to VARA's purpose. Therefore, this Court is

convinced that these definitions were intended by VARA's drafters to be applied in interpreting the statute.

Thus, in determining whether "intentional distortion, mutilation, or modification" of the Work would be "prejudicial to [plaintiffs'] honor or reputation," this Court will consider whether such alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community. Of course, the above-quoted definition of "reputation" does not require that the artists' reputation be derived independently of the art work that is the subject of this dispute. See H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 15, reprinted in, 1990 U.S.C.C.A.N. at 6925 ("[A]n author need not prove a pre-existing standing in the artistic community. The Committee appreciates that less well-known or appreciated artists also have honor and reputations worthy of protection."). Moreover, the legislative history of VARA suggests an analytical framework within which to ascertain whether a given action may be prejudicial to artists' honor or reputation: "The Committee believes that the best approach to construing the term 'honor or reputation' . . . is to focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected. . . . The formulation for determining whether harm to honor or reputation exists must of necessity be flexible." Id. at 6925.

The purpose of 17 U.S.C. § 106A(a)(3)(A) is to protect artists' integrity by forbidding alteration of works of visual art if such alteration would be prejudicial to the artists' honor or reputation. Testimony adduced at trial supports plaintiffs' contention that their honor and reputation would be damaged if the Work is distorted, modified, or mutilated. Professor Robert Rosenblum, a professor of art history at New York University, an art critic, and the author of numerous books on art and art history testified as an expert witness that

plaintiffs' reputation would be damaged if the Work is distorted. (HTr., at 106-07). I found Professor Rosenblum to be a well-qualified and credible witness. In addition, Jack S. Shainman, president and director of an art gallery specializing in contemporary art, also testified that mutilation of the Work would damage plaintiffs' honor or reputation. (TTr., at 207-08). I found Mr. Shainman to be experienced in the field of contemporary art and to be a credible witness. Similarly, Professor Darroll testified that plaintiffs' honor and reputation in the artistic community would be damaged if the Work is modified because the Work would then present to viewers an artistic vision materially different from that intended by plaintiffs. (TTr., at 185-87). I credit this testimony.

Defendants called Hilton Kramer to testify regarding, inter alia, plaintiffs' reputation and the quality of the Work. Mr. Kramer is currently employed as an editor of a monthly magazine that reviews art called "The New Criterion," and in the past has been employed by The New York Times as an art news editor and art critic. (TTr., at 289). Mr. Kramer's credentials as an art critic are well established. (TTr., at 324).

Mr. Kramer did not testify as to whether plaintiffs' honor or reputation would be damaged if the Work is distorted, modified, or mutilated. Rather, Mr. Kramer testified concerning the potential impact of removing the Work. (TTr., at 297). It is evident from the totality of Mr. Kramer's testimony, however, that he believes that alteration of the Work would not adversely impact plaintiffs' reputation because, in his opinion, the artists have no reputation. (TTr., at 297). Mr. Kramer bases his opinion to this effect on his belief that "[t]here is no literature to support the reputation or no literature of any significance." (TTr., at 297).

Weighing Mr. Kramer's opinion in this regard against that the other testimony on point, this Court finds more persuasive and more probative the testimony of Professor Rosenblum, Professor Darroll, and Mr. Shainman. Thus, I will accord this testimony greater weight on this point. While Professor Rosenblum, Professor Darroll, and Mr. Shainman are experts actively involved with contemporary art and in the contemporary artistic community, it appears from the record that Mr. Kramer's expertise is myopic. (TTr., at 321-22; see also infra note 13 and accompanying text). In addition, Mr. Kramer's criterion for determining whether plaintiffs' reputation would be harmed--that he is unaware of any "literature of any significance" concerning their work--encompasses only one factor that the Court must consider. In Mr. Kramer's opinion, no artist has a reputation in the art world unless Mr. Kramer is familiar with writings about that artist. I find this to be an unpersuasive basis for determining whether alteration of the Work would adversely affect plaintiffs' honor or reputation.

I find that plaintiffs indeed possess honor and reputations worthy of protection. While plaintiffs' collective reputation--as the Three Js--has been generated primarily in connection with the Work, each plaintiff also has preexisting honor and reputation as an artist in his own right. Finally, I credit Professor Rosenblum's, Professor Darroll's, and Mr. Shainman's testimony, based on their expertise in the area of contemporary art, that plaintiffs' reputations would be damaged by "intentional distortion, mutilation, or modification" of the Work.

C. 17 U.S.C. § 106A(a)(3)(B): Recognized Stature

17 U.S.C. § 106A(a)(3)(B) provides that the author of a work of visual art shall have the right "to prevent any

destruction of a work of recognized stature." This provision is preservative in nature: Congress was concerned that the destruction of works of art represented a significant societal loss. See H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 16, reprinted in, 1990 U.S.C.C.A.N. at 6926; see also Edward J. Damich, The Visual Artists Rights Act of 1990: Toward A Federal System of Moral Rights Protection For Visual Art, 39 Cath. U.L. Rev. 945, 955 (1990) [hereinafter "Damich"].

The phrase "recognized stature" is not defined in VARA. In light of the preservative goal of this Section, however, the recognized stature requirement is best viewed as a gate-keeping mechanism--protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature. A plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti. As one commentator has noted, "The advantages of the 'of recognized stature' qualification include barring nuisance law suits, such as [a law suit over] the destruction of a five-year-old's fingerpainting by her class mate . . . ." Damich, at 954; see Ginsburg, at 480 n. 19. Nor must the trier of fact personally find the art to be aesthetically pleasing; indeed, courts have persistently shunned the role of art critic. See, e.g., Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-53 (1903).

The recognized stature requirement must be interpreted in such a manner as to maintain the preservative purpose of 17 U.S.C. § 106A(a)(3)(B) and in light of this Section's plain meaning. Thus, for a work of visual art to be protected under this Section, a plaintiff must make a two-tiered showing: (1) that the visual art in question has "stature," i.e. is viewed as meritorious, and (2) that this stature is "recognized" by art experts, other members of the artistic community, or by some cross-section of society. In making this showing, plaintiffs

generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.[10] Finally, in order to be entitled to injunctive relief, a plaintiff must show that the defendant has commenced destruction of, or intends to destroy, the subject art work.[11]

Consideration of the testimony of the expert witnesses who testified at trial leads to the conclusion that the Work is a work of recognized stature.[12] For example, Professor

10. An earlier version of VARA provided that a "court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature." S. 1198, 101st Cong., 1st Sess., 135 Cong. Rec. S6811-13 (daily ed. June 16, 1989). Although this provision was eliminated from VARA prior to enactment, thus providing courts greater discretion with regard to what sources may be considered in determining whether a given work of visual art is a work of recognized stature, courts can, and should, consider these sources in determining whether a given work is of recognized stature.

11. Plaintiffs have made this showing in the instant case. Although defendants have backed off from their initial position somewhat (TTr., at 663), defendants' counsel has stated on the record that "it has already been conceded, I believe, or acknowledged on both sides that we don't want the sculptures there at all. . . . We don't want them there." Carter v. Helmsley-Spear, Inc., 94 Civ. 2922 (DNE) (May 31, 1994 Hearing Transcript), at 16; see also TTr., at 312. It is therefore clear from the record that defendants want to remove the Work. The art experts who were called to testify, including an expert witness called by defendants (TTr., at 302), uniformly agreed that removal of the Work would cause its destruction.

12. VARA does not delineate when a work must attain "recognized stature" in order to be entitled to protection under this Section.

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Rosenblum testified that "this was [a] coherent ongoing program" and that he wants "everybody to go and see it." (HTr., at 102). Further, Professor Rosenblum testified that the sculpture is "a work of art like almost nothing I've ever seen before" (HTr., at 104), and that "the one thing that I know absolutely is that this is an incredible phenomenon and I want to see it again and learn more about it. And I am sure there are countless other people who would feel like me if they saw it" (HTr., at 106). I credit this testimony.

Furthermore, Kent Barwick, president of the Municipal Art Society of New York ("the Society"), and a former chairman of the New York City Landmarks Preservation Commission, was called by plaintiffs to testify as an expert witness. Mr. Barwick testified that the Society sponsors tours of "noteworthy works of art or architecture in the City of New York." (HTr., at 111). Mr. Barwick testified that, to this end, the Society organized a tour of the Work in February 1994. (HTr., at 111). Mr. Barwick stated that those who had gone on the February tour were "very, very excited" about the Work, and that they were anxious to have the tour of the Work made a permanent part of the Society's tour schedule. (HTr., at 111). Finally, Mr. Barwick testified that

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Considering the purpose of this Section, the Court does not view this as unintentional. The test is whether the art work at issue is of recognized stature, not when it attained this status. This interpretation is wholly consistent with the preservative goal of this Section. It should be noted, however, that there is evidence in the record that the Work became a work of recognized stature prior to the filing of plaintiffs' complaint in this action. (See, e.g., HTr., at 111-18; TTr., at 46, 76-77, 79, 83).

the Work constituted one of the great spaces located in New York (HTr., at 115) and that "it's very much in the public interest of the City of New York if it's at all possible to see this piece maintained and, if possible, finished" (HTr., at 117-18). I found Mr. Barwick to be a credible witness, and I credit this testimony.

Plaintiffs also called Professor Darroll as an expert witness to testify concerning the stature of the Work. As already noted, Professor Darroll teaches two- and three-dimensional design, and is an expert in visual art, including sculpture. Professor Darroll testified that he was "very exhilarated" by the Work, and that "[t]he imagination of the [W]ork is tremendous. It's overall a very exciting piece." (TTr., at 183). Professor Darroll then enumerated the standards that he uses to judge whether a given work is a work of stature. (TTr., at 189-90). Applying these standards to the Work, Professor Darroll opined that the Work has stature. (TTr., at 191). I found Professor Darroll to be well-qualified and credible, and I credit his opinion in this regard.

Defendants called Mr. Kramer, who testified as an expert witness that, in his opinion, the Work is not a work of recognized stature. (TTr., at 292-93). Mr. Kramer clearly does not like the Work, and during his direct testimony deemed it "a pastiche of recognized cliches." (TTr., at 298). Mr. Kramer further stated that "It is a work so lacking in merit that I believe that it serves no useful purpose to retain it." (TTr., at 300). As noted above, this Court qualified Mr. Kramer as an expert witness but finds that his opinion is so colored by his disdain for contemporary art in general as

to be of little probative value.[13] Thus, I found Mr. Kramer's testimony in this regard to be unpersuasive and unconvincing and found the testimony of Professor Rosenblum, Professor Darroll, and Mr. Barwick both persuasive and probative.

On the record before the Court, I find that the Work is a work of recognized stature. Accordingly, the Work is entitled to protection under 17 U.S.C. § 106A(a)(3)(B).

D. Defendants' Constitutional Arguments

Defendants contend that if VARA is interpreted so as to protect the Work, VARA is unconstitutional. Defendants argue that VARA "violates the Fifth Amendment by giving a third party the right to control the use of Associates's property." Defendants' Post-Trial Memorandum of Law, at 61.[14] Defendants face a heavy burden in making this

13. Mr. Kramer testified on cross examination that he believes that "most of the art in the current scene is of a shockingly low level" and that "the very notion of quality in art has been discarded." (TTr., at 322). From the record it is evident that he rejects contemporary art as intrinsically meritless. (TTr., at 321-23). Mr. Kramer's apparent disdain for contemporary art leads this Court to accord his opinion testimony significantly less weight than that of the other experts who testified, who are intimately familiar with evolving standards in the area of contemporary art.

14. Prior to the commencement of trial, defendants also raised an argument that VARA is unconstitutionally vague. Specifically, defendants argued that the terms "honor," "reputation," and "stature" are not defined by VARA and their meanings cannot reasonably be ascertained. Defendants abandoned this argument following trial, however, and have not briefed this issue in their post-trial memorandum. Nevertheless, I note that the terms objected to by defendants have a common sense, easily

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argument. See, e.g., Federal Election Comm'n v. Political Contributions Data, Inc., 943 F.2d 190, 191 (2d Cir. 1991) ("congress is presumed to have passed statutes which are constitutional"). For the reasons discussed below, defendants' constitutional arguments are both legally and factually without merit.

In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), the Supreme Court enunciated the foundation of modern takings jurisprudence, writing that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." In the ensuing decades the Supreme Court has repeatedly revisited the issues presented in Pennsylvania Coal in order to determine when regulation "goes too far." See, e.g., Raymond R. Coletta, Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence, 40 Am. U. L. Rev. 297 (1990) (collecting cases) [hereinafter "Coletta"]. Although no single test has been enunciated to ascertain whether a given law or regulation constitutes an impermissible taking absent compensation, the jurisprudence that has developed in this area sets the parameters of the inquiry and gives the Court significant guidance in the instant case.

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understood meaning that should be apparent to all parties reviewing VARA. Like the statute reviewed in Grayned v. City of Rockford, 408 U.S. 104 (1972), VARA is "marked by 'flexibility and reasonable breadth, rather than meticulous specificity.'" 408 U.S. at 110 (citation omitted). Thus, VARA is not unconstitutionally vague.

In Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the Supreme Court reviewed a regulatory scheme that bears relevant similarities to VARA. The regulation at issue in Penn Central was the New York City Landmarks Preservation Law ("Landmarks Law"), enacted by New York City to protect its "historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character." 438 U.S. at 109. The Landmarks Law enacted a comprehensive scheme whereby an eleven-member agency identified properties that had special character, or were of historic or aesthetic interest, designated those properties as "landmarks" and, once such designations were made, submitted these designations to the City Board of Estimate for approval, modification, or disapproval. Id. at 110-11. Following the Board of Estimate's decision on the status of a given property, the owner of a "landmarked" property could seek judicial review of the Board's decision. Id. Pursuant to the Landmarks Law, Grand Central Terminal ("the Terminal") was designated as a landmark, and material alteration of the Terminal was forbidden. As a result, the owner of the Terminal was prohibited from building an office tower above it. In Penn Central, the Supreme Court considered whether the Landmarks Law thus effected an impermissible taking.

In reaching its decision that the Landmarks Law did not effect an impermissible taking, the Court found that several factors militated against a finding that a taking had occurred: The Landmarks Law (1) implemented a comprehensive scheme designed to further the public interest; (2) did not specifically or disproportionately burden plaintiff; (3) left much of the commercial value of the property intact and did not interfere with plaintiff's primary economic use of the property; and (4) included some reciprocity of benefits. See Id. at 133-35. As to this last point, reciprocity of benefits, the Court found it sufficient that the building owner was

advantaged as a member of society; the benefit conferred did not necessarily need to flow directly to it in its capacity as a building owner. Id. at 134-35; see also Coletta, at 328-31, 335-39 (discussing reciprocity of benefits analysis). Finally, the Court emphasized that not every law which affects a property owner's right to control his property is a taking because "'[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" 438 U.S. at 124 (quoting Pennsylvania Coal, 260 U.S. at 413).

Like the regulation at issue in Penn Central, VARA may be viewed as impacting the use of land under certain circumstances. There are two major differences between the Landmarks Law and VARA, however, which underscore why VARA is not constitutionally impermissible. First, VARA applies only to those protected works that are installed after the effective date of the statute. This in and of itself undermines defendants' argument that VARA effects an unconstitutional taking. Second, any impact that VARA might have on defendants' property is temporary: VARA protection subsists only for the life of the last surviving author of a covered work.

Even ignoring these factors, VARA does not effect an impermissible taking. VARA creates a comprehensive scheme, duly enacted by Congress, to protect and ensure the preservation of certain types of art work so as to advance the public interest and protect artists' moral rights. VARA is specifically designed to further the public interest.

Moreover, VARA does not disproportionately or unfairly target or burden defendants or the class to which defendants belong. VARA applies only to works installed after the effective date of the statute and permits those seeking to install VARA-covered art work to contractually waive VARA protection.

Furthermore, VARA facially does not diminish property value: It merely provides that once a decision is made to permit the installation of a work of visual art covered by VARA, the art work must remain for the life of the last surviving artist unless the artist or artists waive their VARA rights. On the facts of this case, it is clear that VARA leaves substantially all of the commercial value of the Property intact. It is apparent from the record that the Property can be, and regularly has been, leased to paying tenants. Thus, VARA does not deprive defendants of the primary commercial use of the Property.

VARA also yields reciprocal benefits. Artists benefit by having their work preserved and viewed in the form in which it was created. The public benefits through the preservation of those cultural resources that VARA protects. Building owners benefit both as members of society and, in the long run, by societal interest in the art that is located in their buildings. Indeed, it seems that the preservation of VARA-protected art work will in certain circumstances make owners' properties more, rather than less, commercially viable by generating public interest in those properties.

Defendants argue, however, that as applied here, VARA permits a third party, the net lessee, to permanently occupy defendants' building. In making this argument, defendants rely on Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), in which the Supreme Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. at 426. In reaching this decision, the majority focused on that fact that the statute at issue deprived building owners of a traditional property right, the right to exclude unwanted persons from its property. The Court stated that

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking. As PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), Kaiser Aetna v. United States, 444 U.S. 164 (1979), and the intermittent flooding cases reveal, such temporary limitations are subject to a much more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

Id. at 435 n. 12 (emphasis in original).

VARA neither facially nor as applied here permits the "permanent physical occupation" of property. As discussed above, VARA rights subsist for a limited period of time and are by no means permanent. Moreover, VARA does not authorize even a physical invasion: it merely protects certain art installed after the effective date of the statute.

Finally, defendants' contention that as applied to the facts of this case VARA permits a "permanent physical occupation" by authorizing the net lessee to control the use of defendants' land, is without merit. As a factual matter, it appears from the record that defendants' agents were aware that the Work was being installed and did not object. (UF 28; PExh. 41; TTr., at 224-26). The Work is easily noticeable and could not have been overlooked by anyone visiting the Property. Thus, the estoppel certificates issued by Associates (PExh. 41) are particularly relevant because they support a finding that the net lessee had either actual or ratified authority to install the Work. In any event, to the extent that defendants believe that the former net lessee's actions were impermissible, they must seek redress against

the former net lessee for any damages defendants claim to have sustained. This contention alone does not make VARA constitutionally impermissible.

In sum, defendants' constitutional arguments are without merit.

E. The Scope of VARA Protection and Relief in the Instant Case

Plaintiffs have demonstrated that the Work is a single work of visual art, and that the "distortion, mutilation, or other modification" of the Work would be prejudicial to plaintiffs' honor and reputation. Furthermore, plaintiffs have shown that the Work is a work of recognized stature. Finally, plaintiffs have demonstrated that absent injunctive relief, defendants intend to distort, mutilate, modify, and destroy the Work. (See, e.g., Carter v. Helmsley-Spear, Inc., 94 Civ. 2922 (DNE) (May 31, 1994 Hearing Transcript), at 16; TTr., at 99, 149-51, 229-32, 312).

i. Injunctive Relief

17 U.S.C. § 502(a) provides that "[a]ny court having jurisdiction of a civil action arising under [the Copyright Act] may . . . grant temporary or final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." As amended, 17 U.S.C. § 501(a) includes violations of an author's rights under 17 U.S.C. § 106A(a) as actions infringing a copyright. In addition, the Court is vested with broad equitable powers to issue an injunction when the need for this remedy is established, see, e.g., SEC v. Posner, 16 F.3d 520, 521-22 (1994), and "'has a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct,'" Etuk v. Slattery, 936 F.2d 1433, 1443 (2d Cir. 1991) (quoting Springs Mills Inc. v. Ultracashmere House Ltd., 724 F.2d 352, 355 (2d Cir.

1983)); see Soltex Polymer Corp. v. Fortex Indus. Inc., 832 F.2d 1325, 1329 (2d Cir. 1987). Of course, this discretion must be exercised soundly in light of the relevant facts adduced at trial.

Plaintiffs are entitled to an injunction prohibiting defendants from distorting, mutilating, or modifying the Work. In addition, plaintiffs have shown that removing the Work would necessarily result in its distortion, mutilation, or modification because certain elements of the Work cannot be removed without being destroyed.

Further, plaintiffs are entitled to an injunction prohibiting defendants from destroying the Work. Because elements of the Work must be destroyed in order to be removed, the Work may not be removed from the Lobby.

Like Howard Roark in Ayn Rand's Fountainhead, plaintiffs wish to continue creating the Work regardless of the barriers to completion that are presented. Plaintiffs have not shown, however, that VARA gives them the right to complete, or engage in further work on, the Work. VARA mandates preservation of protected art work and the protection of artists' moral rights. It does not mandate creation. Nothing in the statute compels defendants to allow plaintiffs to engage in further creation. Contrary to plaintiffs' assertion, defendants' refusal to permit plaintiffs to "finish" the Work does not constitute "distortion, mutilation, or other modification" under 17 U.S.C. 106A(a)(3)(A).

ii. Damages Costs, and Attorney's Fees

1. Damages

17 U.S.C. § 501(a) provides that any person or entity that violates 17 U.S.C. § 106A(a) is an "infringer" of the "right of the author." In order to bring an action to recover damages for a violation of the rights conferred by 17 U.S.C. §

106A(a), the author of the relevant work of visual art need not have registered that work with the Register of Copyrights. 17 U.S.C. §§ 411 & 412. When an infringement of the author's moral rights has been shown, the author may recover, inter alia, either actual damages, 17 U.S.C. § 504(a) & (b), or at his or her election, statutory damages, 17 U.S.C. § 504(a) & (c).

Plaintiffs have demonstrated that defendants intend to violate their VARA rights. Accordingly, as already discussed, plaintiffs are entitled to prospective injunctive relief. Plaintiffs have not shown, however, that defendants have violated their VARA rights to date.

This Court heard testimony that certain sculptural elements have been temporarily altered or rendered inoperable by defendants and/or defendants' agents. (See, e.g., TTr., at 99, 149-51). These alterations were quickly remedied. (TTr., at 177). While these temporary alterations coupled with other evidence in the record support a finding that defendants intend, in the absence of injunctive relief, to violate plaintiffs' VARA rights, these incidents in and of themselves do not constitute a violation of plaintiffs' rights under VARA. Plaintiffs failed to prove, among other things, that these brief alterations were prejudicial to their honor or reputation or that they have had the effect of destroying the Work. Thus, plaintiffs are not entitled to recover actual or statutory damages in connection with this claim.

2. Costs and Attorney's Fees

In the American system, parties to litigation generally must bear their own attorney's fees and litigation expenses. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-57 (1975); see also Alan Hirsch and Diane Sheehey, Awarding Attorney's Fees and Managing Fee Litigation 1-2 (1994). The Copyright Act modifies this rule,

however, for actions brought under VARA and the Copyright Act, which VARA amends. 17 U.S.C. § 505 provides that "In any civil action under [the Copyright Act], the court in its discretion may allow the recovery of full costs by or against any party. . . . Except as otherwise provided in [the Copyright Act], the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." The Court may award costs and attorney's fees to a prevailing party in an action alleging the violation of an author's rights under VARA even if the subject work has not been registered with the Register of Copyrights. 17 U.S.C. §§ 411 & 412.

In Fogerty v. Fantasy, Inc., 114 S.Ct. 1023 (1994), the Supreme Court reviewed this Section as it concerns the imposition of reasonable attorney's fees. The Fogerty Court held that "attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion. 'There is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" 114 S.Ct. at 1033 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436-37 (1983)). Among the factors that this Court may consider in exercising its discretion to award reasonable attorney's fees under this Section are: (1) the "'frivolousness'" of the action or defense, id. at 1033 n. 19 (quoting Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986)); (2) the "'motivation'" of the parties, id.; (3) "'objective unreasonableness (both in the factual and in the legal components of the case),'" Id.; and "'the need in particular circumstances to advance considerations of compensation and deterrence,'" Id.

Having weighed the relevant factors in the instant case, the Court finds that an award of costs and attorney's fees to plaintiffs would be inappropriate. The parties to this action vigorously contested each other's claims. In doing so, the

parties were required to brief legal issues and engage in statutory interpretation without the guidance of direct precedent. This Court is the first district court in the country to interpret and apply the sections of VARA at issue here. On this basis alone it would be inappropriate to enter an award of costs and attorney's fees.

In addition, such an award is unnecessary to serve the interests of deterrence. The record demonstrates that defendants have complied with this Court's orders and have not violated plaintiffs' VARA rights to date. Should defendants violate this Court's orders or plaintiffs' VARA rights in the future, this Court will not hesitate to order an appropriate monetary award, award costs and attorney's fees, or impose other appropriate sanctions.

In sum, I find that plaintiffs are not entitled to an award of costs and attorney's fees. Accordingly, plaintiffs' request for reimbursement of costs and attorney's fees in connection with their VARA claim is denied.

II. PLAINTIFFS' SECOND CLAIM FOR RELIEF: COPYRIGHT INFRINGEMENT

Plaintiffs allege that defendants have willfully infringed plaintiffs' copyright in the Work and seek statutory damages and an award of attorney's fees in connection with this alleged infringement. (JPTO, at ¶ 4(a)(2)). As an initial matter, it is clear from the record that the Work is copyrightable and that plaintiffs own the copyright in the Work. (DExh. NN; UF 26).[15] It is undisputed, however, that

15. The parties have stipulated that plaintiffs own the copyright to the Work. (UF 26). In addition, defendants have stated that they "have no objection to providing plaintiffs with reasonable

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plaintiffs have never obtained, or sought to obtain, registration of this copyright. (UF 26). Accordingly, defendants argue that this Court is without jurisdiction to decide plaintiffs' copyright infringement claim and that this claim must be dismissed.

Registration is not a prerequisite to copyright protection under the Copyright Act. 17 U.S.C. § 408(a); see also Alan Latman, Robert A. Gorman, Jane C. Ginsburg, Copyright for the Nineties 390-92 (1989) (tracing the evolution of the registration requirement and other copyright formalities). Registration is, however, a prerequisite to a suit alleging the infringement of the copyright of works, such as the one at the center of this dispute, whose country of origin is the United States. See 17 U.S.C. § 411(a) ("[N]o action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title.").[16] Moreover, the remedies for

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additional access [to the Work] for the purpose of exploiting their copyright." Defendants' Post-Trial Memorandum of Law, at 77. Moreover, this Court has broad equitable power to enjoin defendants from denying plaintiffs and their invitees access to the Work for the purpose of exploiting this copyright. See, e.g., Community for Creative Non-Violence v. Reid, 86 Civ. 1507 (TPJ), 1991 U.S. Dist. LEXIS 20227, slip op., at *2-*3 (D.D.C. Oct. 16, 1991).

16. Although not relevant in this case, 17 U.S.C. § 411(a) also provides that

where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute

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infringement are limited if the copyrightable work is not registered: "[N]o award of statutory damages or of attorney's fees . . . shall be made for . . . any infringement of copyright in an unpublished work commenced before the effective date of its registration." 17 U.S.C. § 412.

Because proper registration is a prerequisite to an infringement suit, this Court is without jurisdiction to decide plaintiffs' claim that defendants have infringed their copyright in the Work. See, e.g., Wagstaff-El v. Carlton Press Co., 913 F.2d 56, 58 (2d Cir. 1990) (stating that dismissal for failure to prove valid registration was proper), cert. denied, 499 U.S. 929 (1991); Whimsicality Inc. v. Rubie's Costume Co., 891 F.2d 452, 453 (2d Cir. 1989) ("proper registration is a prerequisite to an action for infringement"); Conan Properties Inc. v. Mattel Inc., 601 F. Supp. 1179, 1182 (S.D.N.Y. 1984) (copyright infringement claim barred absent proof that copyright has been registered).[17] The cases cited by plaintiffs in support of their contention that this Court has jurisdiction to decide their infringement claim, see Plaintiffs' Post-Trial Memorandum, at 33 n. 28, are inapposite. Accordingly, plaintiffs' claim for copyright infringement, and for recovery of statutory

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an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyright.

17. Assuming that plaintiffs register the Work with the Register of Copyrights, the Court would have jurisdiction over a suit brought by plaintiffs in the future should defendants engage in conduct subsequent to the filing of this Opinion that constitutes copyright infringement under the Copyright Act.

damages and attorney's fees in connection therewith, is dismissed.

III. PLAINTIFFS' THIRD CLAIM FOR RELIEF: TORTIOUS INTERFERENCE WITH CONTRACT

Plaintiffs allege that, by prohibiting plaintiffs from engaging in further work on the Work and by barring them from the Property, defendants tortiously interfered with a contract between plaintiffs on the one hand, and Sig or the Limited Partnership on the other. (JPTO, at ¶ 4(a)(3)). This claim, based on New York law, is brought pursuant to this Court's supplemental jurisdiction. See 28 U.S.C. § 1367(a).

In order to recover on a claim of tortious interference with contractual relations under New York law, plaintiffs must prove four elements: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff." Kronos, Inc. v. AVX Corp., 595 N.Y.S.2d 931, 934 (1993) (citing Israel v. Wood Dolson Co., 1 N.Y.2d 116, 120 (1956)). The New York Court of Appeals has described this cause of action in the following manner:

> The American Law Institute in the Restatement of the Law of Torts 2d, adopted May, 1977, has stated the fundamental principle: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to

> perform the contract." (§ 766.) The keystone of the statement is the adverb "improperly" . . . the definition of which is inconstant and mutable, drawing its substance from the circumstances of the particular situation at hand. Section 767 of the Restatement sets out several factors for consideration in determining whether an intentional interference with a contract is "improper", accompanied by the observation that "[the] issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation" (Comment b).

Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 428 N.Y.S.2d 628, 631-32 (1980). The factors set out in Section 767, to which the Guard-Life court refers are:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Restatement of the Law of Torts (second) § 767. For the reasons discussed below, I find that plaintiffs have failed to prove defendants' "intentional inducement of the third party to breach or otherwise render performance impossible." Kronos, Inc., 595 N.Y.S.2d at 934.

Defendants' conduct vis-a-vis the events alleged by plaintiffs must be examined in light of the state of mind, intent, and knowledge of defendants at the time the events that gave rise to this claim occurred. There is some evidence in the record that suggests defendants initially excluded plaintiffs from the Property after one of defendants' agents became angry when a gong that is incorporated in the Work rang in his close proximity. (TTr., at 118, 122-24, 171-75). It appears from the record, however, that this incident was brief in duration and was a minor factor in the exclusion of plaintiffs from the Property. The record as a whole supports defendants' contention that, at the time they denied plaintiffs access to the Property, they believed they were exercising their prerogative as owners of the Property to exclude unwanted persons from the premises and to prevent the ongoing installation of art that they did not find aesthetically pleasing.

Plaintiffs have not demonstrated that the nature of defendants' conduct--excluding unwanted persons from the Property and preventing further installation of art work--was patently unreasonable at the time the conduct occurred. In addition, plaintiffs have not demonstrated that defendants' motives, or the interests that they sought to advance, were improper. While it appears that defendants' actions did have the effect of interfering with the fulfillment of the Contract, plaintiffs have failed to show that this was defendants' purpose in excluding plaintiffs.

Finally, any damage to plaintiffs as a result of defendants' actions was negligible since (1) plaintiffs have not demonstrated that they have the right to conduct further work on the Work, and (2) the entity with whom plaintiffs had contracted to create the Work entered bankruptcy proceedings a day after plaintiffs were excluded and could no longer pay them. While plaintiffs may well have been upset

when they were barred from the Property (TTr., at 63-64), I do not credit plaintiffs' contention that they suffered damage in the form of mental anguish or emotional distress.

In sum, on the record before the Court, I find that plaintiffs have failed to prove that they are entitled to recover on their claim for tortious interference with contract, and this claim is therefore dismissed.

IV. PLAINTIFFS' FOURTH CLAIM FOR RELIEF: UNLAWFUL EJECTION FROM REAL PROPERTY

Plaintiffs' next supplemental state law claim seeks recovery for unlawful ejection from the Property. (JPTO, at ¶ 4(a)(4)). Plaintiffs aver that "[d]efendants have unlawfully ejected plaintiffs from property on which they were legally entitled to be present under the license granted them by Sig and/or the Limited Partnership." (JPTO, at ¶ 4(a)(4)) (emphasis added). Plaintiffs state that "There is no dispute that, as of April 7, 1994, plaintiffs were licensees entitled to be on the Property," Plaintiffs' Post-Trial Memorandum, at 36 (emphasis added), and argue that they are therefore entitled to recover damages pursuant to New York Real Property Actions and Proceedings Law Section 853 ("RPAPL § 853").[18] Defendants argue that, because

18. It should be noted that Black's Law Dictionary defines a licensee as: "A person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor." Black's Law Dictionary 830 (5th ed. 1979). In contrast, Black's

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Law Dictionary defines an "invitee" in the following manner: "A person is an 'invitee' on land of another if (1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land and (3) there is mutuality of benefit or benefit to the owner." Id. at 742. These definitions are consistent with those employed by New York courts. See, e.g., Davis v. Shelton, 304 N.Y.S.2d 722, 725 (App. Div. 1969); Le May v. General Elec. Co., 451 N.Y.S.2d 990, 993 (Sup. Ct. 1982).

Because plaintiffs concede that they were "licensees," and defendants argue that plaintiffs were licensees if they were not employees (which, the Court has found, they were not), the Court will not consider whether plaintiffs were licensees or invitees under New York law. Because plaintiffs' concession here is somewhat puzzling, it must be assumed that plaintiffs' primary contention on this claim is that they are entitled to recover damages stemming from defendants' allegedly wrongful lock-out of plaintiffs from a space adjacent to the Lobby that plaintiffs had formerly used as a work shop. Arguably, this space was licensed to plaintiffs in their status as independent contractors for their sole benefit, since provision of this space relieved plaintiffs of the necessity of maintaining a separate studio off-site and may not have inured to Sig's, Corporate Life's, or the Limited Partnership's benefit. Because it is not clear whether plaintiffs seek recovery of damages in connection with their ejection from this space alone, or also from the Lobby and/or the entirety of the Property to which they previously had access, this Court will consider plaintiffs' fourth claim for relief in relation to all of the aforementioned areas.

plaintiffs were either employees[19] or mere licensees, plaintiffs cannot recover under RPAPL § 853. See Defendants' Post-Trial Memorandum of Law, at 87-88.

RPAPL § 853 provides that

> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrongdoer.

N.Y. Real Prop. Acts. and Proc. § 853 (McKinney 1994). One commentator has expressed the reach of this provision in the following manner:

> RPAPL 853 and its predecessor, New York's forcible and detainer statute, were enacted to discourage undue intimidation and violence in the ejection of persons from real property by providing for treble damages under certain circumstances, but not to prohibit resort to summary ouster. The decision by the Court of appeals in Napier v. Spielmann, 1909, 196 N.Y. 575, 90 N.E. 1162, that a tenant or licensee acquired no possessory interest in property is still valid authority. While it is true that tenants as defined in RPAPL 711 may be evicted only through legal proceedings, others, such as licensees and squatters, who are covered by RPAPL 713, are not so

19. As noted above, this Court rejects this contention and finds that plaintiffs were independent contractors. See supra p. 32.

> protected. While RPAPL 713 permits a special proceeding as an additional means of effectuating removal of nontenants, it does not replace an owner's common-law right to oust an interloper without legal process. P & A Bros., Inc. v. City of New York Dept. of Parks & Recreation, 1992, 184 A.D.2d 267, 585 N.Y.S.2d 335.

John J. Meehan, Supplemental Practice Commentary (1993) (emphasis in original), reprinted in, 49.5 McKinney's Real Prop. Acts. and Proc. (1994 Cumulative Annual Supp.), at 145. Under New York law, "[w]hile it is true that tenants . . . may be evicted only through lawful procedure, others, such as licensees . . . who are covered by RPAPL 713 are not so protected. Thus, RPAPL 713 merely permits a special proceeding as an additional means of effectuating the removal of nontenants, but it does not replace an owner's common-law right to oust an interloper without legal process." P & A Bros., Inc. v. New York Dep't of Parks & Recreation, 585 N.Y.S.2d 335, 336 (App. Div. 1992) (citations omitted); but see Friends of Yelverton, Inc. v. 163rd Street Improvement Council, Inc., 514 N.Y.S.2d 841, 843 (N.Y. City Civ. Ct. 1986) (deeming defendant's action in evicting licensee without resort to summary proceedings improper on the facts presented). It has long been the rule in New York that a licensee, as opposed to a tenant or one having a greater interest in the use of particular real property, cannot maintain an action for wrongful ejection. See, e.g., Napier v. Spielmann, 111 N.Y.S. 983, 985-86 (App. Div. 1908). RPAPL § 853 does not alter this fundamental rule.

Because plaintiffs concede that they were mere licensees in relation to the relevant areas, plaintiffs cannot recover for unlawful ejection from the Property. In addition, I note that even if plaintiffs were more than mere licensees to the

relevant space, plaintiffs have not shown that defendants engaged in the type of wrongful conduct proscribed by RPAPL § 853. Accordingly, plaintiffs have failed to demonstrate that they are entitled to recover on their unlawful ejection claim, and this claim is therefore dismissed.

V. DEFENDANTS' COUNTERCLAIM: WASTE

In their counterclaim, defendants allege that "The creation of the [W]ork has resulted in violations of the Building and Fire Code of the City of New York, has materially changed the nature and character of the [Property], and has resulted in a diminution of the market value of the Property." (JPTO, at ¶ 4(b)). "Defendants' counterclaim alleges that plaintiffs have committed waste with respect to the Property," Defendants' Post-Trial Memorandum of Law, at 89, and is brought pursuant to this Court's supplemental jurisdiction.

An analysis of the doctrine of waste at common law, as reformulated in the Restatement of the Law of Property (second), and as interpreted and applied in New York, conclusively demonstrates that an action for waste can be brought exclusively by a landlord or property owner against a tenant. The common law recognized three actionable types of waste in connection with real property: (1) voluntary waste, also known as affirmative waste, (2) permissive waste, and (3) ameliorative waste. Each of these varieties of waste arises in the context of a landlord-tenant relationship: either the tenant does something, or fails to do something that it is obligated to do, that fundamentally changes the nature of the property that reverts to the owner at the conclusion of the tenancy. As traditionally defined, voluntary waste occurs when a tenant intentionally or negligently damages the premises; permissive waste occurs when the tenant fails to

prevent damage to the premises from the elements, such as by failing to replace a broken window that ultimately leads to water damage; and ameliorative waste occurs when a tenant alters a premises such that it is of changed character at the time it is returned to the owner.

Section 12.2 of the Restatement of the Law of Property (second) discusses and reformulates these concepts. Although the Restatement departs somewhat from the common law formulation of the different types of waste, it recognizes that an action in waste lies exclusively in the context of the landlord-tenant relationship: When the action or inaction of a tenant results in a "change in the physical condition of the leased property" an action in waste may lie. See Restatement of the Law of Property (second) § 12.2 & comment a.

The New York formulation of waste--as applied in connection with real property--is limited to matters presenting a landlord-tenant relationship. In Rumiche Corp. v. Eisenreich, 386 N.Y.S.2d 208 (1976), the New York Court of Appeals discussed the common law cause of action for waste in connection with real property:

> [A]t common law waste had three different definitions, each related to particular types of conduct on the part of tenants. Involuntary waste was defined as failure to prevent damage to the premises, in other words negligence. Equitable waste was defined as failure to do what a prudent owner would do and was available as a cause of action only in limited circumstances. . . . [V]oluntary waste . . . occurs when a tenant injures the premises by an affirmative act (see 5 Powell, Real Property, par. 640; 63 N.Y.Jur., Waste, § 2, p. 109, and cases cited therein).

* * *

> It is the impingement upon the ultimate estate of the landlord which is the keynote to the definition of waste (Rasch, New York Landlord and Tenant [2d ed.], § 455). Its application in a modern landlord-tenant setting is well described in Pross v. Excelsior Cleaning & Dyeing Co., 110 Misc. 195, 201, 179 N.Y.S. 176, 179: "[S]uch a change as to affect a vital and substantial portion of the premises, as would change its characteristic appearance, the fundamental purpose of the erection, or the uses contemplated, or a change of such a nature, as would affect the very realty itself--extraordinary in scope and effect, or unusual in expenditure."

Rumiche Corp., 386 N.Y.S.2d at 210-11 (footnote omitted). Thus, in order to recover on a claim of waste, the party seeking recovery must show at a minimum: (1) that a tenant has taken some action, or failed to take required action, id.; (2) that as a result of the tenant's action or failure to act the fundamental character of the property has been changed, id.; and (3) the action or inaction has caused "permanent or lasting damage. . . . [N]ot every change or alteration made by a tenant constitutes waste," id. at 211.

As to the first requisite showing, however, defendants contend that the party accused of waste need not be a tenant, but instead may be a third party. In support of this curious proposition, defendants cite two cases decided by the Third and Fourth Departments of the New York Supreme Court Appellate Division in 1907 and 1914 respectively. Contrary to defendants' contention, the first case they have cited, Morgan v. Waters, 122 A.D. 340 (App. Div. 1907), actually supports the proposition that an action in waste cannot be

brought against a non-tenant third party. In Morgan, the respondent argued that the action could not lie because "an action in waste cannot be maintained against a stranger." 122 A.D. at 342. The Morgan court did not disagree but wrote that "this is not strictly an action of waste. In Livinston v. Haywood (11 Johns. 429) the action of waste is recognized against the tenant, but it is held that a revisioner may have an action of trespass against a stranger. The limitations of the Code, therefore, applicable to an action of waste brought thereunder do not in any way limit plaintiffs' right of action here." Id. Thus, Morgan is not inconsistent with later New York cases on point holding that an action in waste in connection with real property may by pursued only by a landowner/landlord against a tenant.

The second case cited by defendants, Iroquois Brewing Co. v. Thomas Cusack Co., 147 N.Y.S. 1117 (App. Div. 1914), likewise does not hold that an action for waste can lie against a non-tenant. This one-paragraph memorandum order reversing a lower court determination does not state that an action in waste may lie against a non-tenant, but rather that a non-tenant defendant could be liable "under section 1651 of the Code of Civil Procedure, as assignee of the tenant" when defendant's actions may have caused "damage to the building in the nature of waste." Iroquois Brewing Co., 147 N.Y.S. at 1117. Thus, Iroquois Brewing is inapplicable on the facts of this case because defendants have neither alleged nor shown that plaintiffs were assignees of the tenant. It also does not support the proposition for which defendants have cited it because Iroquois Brewing simply does not hold that an action sounding in waste and in the context of real property can be maintained against a non-tenant. Finally, even if it were read to support this proposition, Iroquois Brewing would no longer be controlling authority in light of subsequent pronouncements by the New York Court of Appeals to the contrary.

Defendants' counterclaim is therefore deficient. First, the parties against whom the counterclaim is asserted were not tenants, but rather were independent contractors hired by the net lessee and/or its agents. To the extent that an action for waste may lie, defendants have moved against the wrong party. Defendants must pursue their claim sounding in waste, if at all, against the former net lessee.

Second, defendants have not shown that the fundamental character of the Property has been changed. The Property is a commercial building in which space is leased to retail, commercial, and light manufacturing entities. Plaintiffs' actions have not had any impact on this fundamental character.[20]

Third, defendants have not shown that plaintiffs' actions have caused any permanent or lasting damage to the Property. Defendants have shown that certain parts of the Property are not currently in compliance with New York City building and electrical codes. This is not determinative, however. As an initial matter, defendants' experts have testified that, with one minor exception, any noncompliance with applicable codes can be remedied without altering the Work. Thus, any "damage" of this variety certainly is not permanent or lasting. Moreover, under the terms of the Net Lease, the net lessee--not plaintiffs--was responsible for

20. Although the attachment of sculptural elements to the ceiling of the Lobby may have decreased the "live load" of the floor immediately above the Lobby, it is clear from the record that this alteration is negligible and does not impact the fundamental character of the Property.

ensuring compliance with applicable codes. (DExh. BBB, at 10-11 §§ 6.03-6.04).

Defendants' counterclaim therefore fails both as a matter of law and fact. Under New York law, a claim for waste in the context of real property may be maintained only against a tenant, not a third party independent contractor hired by the tenant. Even assuming that such a claim could lie, defendants have not established the factual predicate for such a claim against plaintiffs. Accordingly, defendants' counterclaim must be dismissed.

CONCLUSION

For the reasons discussed above, plaintiffs' second, third, and fourth claims for relief are dismissed with prejudice. Defendants' counterclaim is also dismissed with prejudice. Plaintiffs' requests for an award of money damages and for reimbursement of costs and attorney's fees in connection with their first claim for relief is denied.

Plaintiffs are entitled to injunctive relief with regard to their first claim for relief:

Accordingly, IT IS HEREBY ORDERED that defendants, their agents, their employees, and their representatives are enjoined from (1) distorting, mutilating, or modifying plaintiffs' art work (defined herein as "the Work") installed or located in the Lobby of the Property located at 47-44 31st Street, Queens, New York; (2) destroying this art work; and/or (3) removing this art work, or any portion thereof; and

IT IS FURTHER ORDERED that this injunction pertains only to that art work that has been defined herein as "the Work" (the sculptural installations and sculptural elements that are located within the confines of the Lobby of the Property located at 47-44 31st Street, Queens, New York),

including, but not limited to (1) art work affixed to, or otherwise located in or on, the floor, walls, and ceiling of the Lobby, including the floor and wall mosaic, and (2) the interior of the three elevators that open into the Lobby; and

IT IS FURTHER ORDERED that this injunction does not prohibit the distortion, mutilation, modification, destruction, or removal of (1) art work created by plaintiffs in areas of the Property other than the Lobby; (2) the entrance steps at the 31st Street entrance; (3) the "building directory;" or (4) lighting fixtures or lighting structures located within the confines of the Lobby, except that this injunction does prohibit distortion, mutilation, modification, destruction, or removal of the "florescent snake," the "illuminated floor placque," "the chandelier," and lighting elements directly incorporated into the Work such as the headlights of the bus; and

IT IS FURTHER ORDERED that this injunction does not prohibit defendants from employing a licensed electrician to rewire sculptural elements within the Lobby in order to bring those elements into compliance with applicable electrical codes, provided that such rewiring does not change the physical appearance of rewired elements or alter their mechanical function; and

IT IS FURTHER ORDERED that the parties may, without violating this injunction, expressly agree in writing to distort, mutilate, modify, destroy, or remove the Work or any portion thereof provided this agreement is (1) embodied in a written agreement, (2) signed by each of the then-living plaintiffs as well as by defendants' agent or successor in interest, and (3) dated and notarized; and

IT IS FURTHER ORDERED that nothing in this injunction shall confer upon plaintiffs the right to engage in further creation of the Work, except that plaintiffs may, at

their own expense, and within ninety (90) days of the date of this Opinion, repair (1) the "astronaut" and (2) the "illuminated floor placque," which became dysfunctional subsequent to the commencement of this suit. If plaintiffs elect to make these repairs, defendants may elect to have any necessary electrical work completed by a licensed electrician working under plaintiffs' supervision, provided however, that if defendants make this election the costs associated with hiring the licensed electrician shall be born by defendants; and

IT IS FURTHER ORDERED that, whereas plaintiffs have demonstrated that they own the copyright to the Work and the right to exploit that copyright, defendants are enjoined from denying plaintiffs and their invitees reasonable access to the Lobby. For the purpose of this order, reasonable access shall be defined as access Monday through Saturday, except for federal and state holidays, between the hours of 10:00 a.m. and 5:00 p.m.; and

IT IS FURTHER ORDERED that this injunction will remain in effect until the death of the last surviving author of the Work. For the purpose of this order, the authors of the Work are John Francis Carter, John Meade Swing, and John James Veronis, Jr.; and

IT IS FURTHER ORDERED that the preliminary injunction issued by this Court in this case on May 18, 1994 is vacated; and

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment in accordance with this Opinion & Order.

SO ORDERED.

Dated: New York, New York
August 31, 1994

s/ David N. Edelstein
U. S. D. J.

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Visual Artists Rights Act of 1990

United States Code
Title 17

§ 101. Definitions

Expect as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

A work is a "Berne Convention work" if --

(1) in the case of an unpublished work, one or more of the authors is a national of a nation adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a nation adhering to the Berne Convention on the date of first publication;

(2) the work was first published in a nation adhering to the Berne Convention, or was simultaneously first published in a nation adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention;

(3) in the case of an audiovisual work --

(A) if one or more of the authors is a legal entity, that author has its headquarters in a nation adhering to the Berne Convention; or

(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a nation adhering to the Berne Convention;

(4) in the case of a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, the building or structure is located in a nation adhering to the Berne Convention; or

(5) in the case of an architectural work embodied in a building, such building is erected in a country adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a nation adhering to the Berne Convention is considered to be a national of that nation. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more

nations if its dates of publication are within 30 days of one another.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

The "country of origin" of a Berne Convention work, for purposes of section 411, is the United States if --

(1) in the case of a published work, the work is first published --

(A) in the United States;

(B) simultaneously in the United States and another nation or nations adhering to the Berne Convention, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that does not adhere to the Berne Convention; or

(D) in a foreign nation that does not adhere to the Berne Convention, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

For the purposes of section 411, the "country of origin" of any other Berne Convention work is not the United States.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over

a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial,

graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

To perform or display a work "publicly" means --

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or

other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

A "work of visual art" is --

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include --

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is --

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

§ 106A. Rights of certain authors to attribution and integrity

(a) Rights of attribution and integrity.--Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art --

(1) shall have the right --

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right --

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) Scope and exercise of rights.--Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright

owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) **Exceptions.**--(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) **Duration of rights.**--(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) **Transfer and waiver.**--(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other

means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as

held applicable and construed by a court in an action brought under this title.

(c) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

(d)(1) In a case in which--

> **(A)** a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and
>
> **(B)** the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as

described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless--

> (**A**) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or
>
> (**B**) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(**3**) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and a procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

§ 301. Preemption with respect to other laws

(**a**) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in

works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(**b**) Nothing in this title annuls or limits any rights or remedies under the common law or statues of any State with respect to--

(**1**) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(**2**) any cause of action arising from undertakings commenced before January 1, 1978;

(**3**) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(**4**) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(**c**) With respect to sound recordings fixed before February 15,1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to

copyright under this title before, on, or after February 15, 2047.

(**d**) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(**e**) The scope of Federal preemption under this section is not affected by the adherence of the Unites States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(**f**)(**1**) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statues of any State.

(**2**) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

> (**A**) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;
>
> (**B**) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or
>
> (**C**) activities violating legal or equitable rights which extend beyond the life of the author.

§ 411. Registration and infringement actions

(a) Except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner--

(1) services notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

§ 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a) or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for--

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the

provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a primary transmission embodying the performance or display of a work and is

actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

§ 506. Criminal offenses

(a) Criminal Infringement.--Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18.

(b) Forfeiture and Destruction.--When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.

(c) Fraudulent Copyright Notice.--Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $2,500.

(d) Fraudulent Removal of Copyright Notice.--Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.

(e) False Representation.--Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section

409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

(f) Rights of Attribution and Integrity.--Nothing in this section applies to infringement of the rights conferred by section 106A(a).

(2)

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No. 95-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN F. CARTER, JOHN M. SWING, and
JOHN J. VERONIS, JR.,

Petitioners,

vs.

HELMSLEY-SPEAR, INC. and 474431 ASSOCIATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court should overturn the holding of the Court of Appeals that the District Court's findings of fact were clearly erroneous?

2. Whether an artist's ownership of the copyright of a work of art precludes the effect of the work for hire exclusion found in the Visual Artists Rights Act of 1990 even though that Act expressly provides that rights thereunder are "distinct" from copyright?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondents advise the Court that Helmsley-Spear, Inc. is a subsidiary of Helmsley Enterprises, Inc., and neither issues stock to the public. All subsidiaries of Helmsley-Spear, Inc. are wholly owned by Helmsley-Spear, Inc. 474431 Associates is a general partnership whose partners are Alvin Schwartz and Supervisory Management Corp., a wholly-owned subsidiary of Helmsley Enterprises, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Helmsley-Spear, Inc. and 474431 Associates ("Associates") respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 1, 1995, which reversed the decision of the United States District Court for the Southern District of New York on the ground that the District Court made clearly erroneous findings of fact when it held that the sculpture at issue (the "Sculpture") was not a work for hire.

COUNTERSTATEMENT OF THE CASE

Associates is the owner of the property at issue, a mixed-use warehouse in Queens, New York (the "Property"). In

February 1990, prior to the enactment of the Visual Artists Rights Act of 1990, 17 U.S.C. § 101 *et seq.* (1994) ("VARA"), Associates leased the Property by a net lease to 47-44 31st Street Associates L.P. ("Limited Partnership").

In December 1991, Petitioners (the "Artists") entered into a written agreement, which is self-described as a "Letter of Employment", with the agent of the Limited Partnership, SIG Management Company ("SIG"), (the "Letter of Employment"). There was never an agreement of any sort between Artists and Associates. An attorney for the Artists assisted the Artists in the negotiation of the Letter of Employment.

The Letter of Employment expressly provided that SIG would own the sculptures created by the Artists, that the Artists would own the copyrights to such sculptures, that SIG and the Artists would share any fees received from the use of such sculptures on a 50/50 basis, and that for a period of five years from the date of the Letter of Employment, SIG would not modify the sculptures without the approval of two of the three Artists, which approval was not to be unreasonably withheld.

From December 1991 through April 6, 1994, the Artists, together with other persons, created and installed the Sculpture in the Property. The work on the Sculpture was commenced without the knowledge or approval of Associates. The Sculpture violates applicable building and electrical codes, has caused a structural change to the Property, and has resulted in unsafe conditions at the Property.

There was no set date for the termination of the Artists' employment. During the years that the Artists worked at the Property, they each received pay of $1,000.00 per week. Federal, state, and local income taxes, and social security and medicare taxes were withheld from the Artists' weekly pay, and, at years' end, appropriate W-2 forms were given to the Artists. Pursuant to the Letter of Employment, SIG and Limited Partnership provided life insurance, health insurance, dental insurance and liability insurance to the Artists. Limited Partnership discontinued the health and dental insurance

benefits in December 1993 and, at that time, extended COBRA benefits to the Artists.

Pursuant to the Letter of Employment, the Artists, if they chose to take them, were provided paid vacations by SIG and Limited Partnership. The Artists were given or offered bonuses of food or gifts at Christmas and Thanksgiving by SIG and Limited Partnership.

The Artists agreed to work principally for SIG and Limited Partnership on a 40 hour per week basis and would only do other work to the extent that it would not "interfere with services to be provided pursuant to the terms of this letter of employment." SIG and Limited Partnership provided the Artists with many, if not most, of the supplies used to create the Sculpture. Although the Artists could use assistants who would be paid by SIG or Limited Partnership, the Artists could not hire any paid assistants without the express approval of either SIG or the Limited Partnership.

SIG and Limited Partnership could and did assign the Artists additional tasks at the Property other than the creation of the Sculpture. The additional tasks assigned to and performed by the Artists included the decorative painting of the boilers in the basement of the Property and the decoration of portions of the sixth and eighth floors for tenants.

In March 1994, Limited Partnership's net lease was terminated, and on April 6, 1994, Limited Partnership surrendered possession of the Property to Associates. The Artists were told by representatives of Associates that they could no longer work at the Property and would have to leave the Property. After April 8, 1994, two of the Artists filed for New York State unemployment insurance benefits with Mr. Swing listing Limited Partnership as his employer.

The District Court determined that the Sculpture was not a work for hire and, therefore, was not excluded from the definition of a work of visual art set forth in VARA.

The Court of Appeals analyzed the work for hire issue pursuant to *Community for Creative Non-Violence v. Reid*[1] and reversed on the ground that the District Court made clearly erroneous findings of fact with respect to the work for hire issue. (16a-22a).

The Artists have quoted part of the Court of Appeals's discussion concerning whether the Artists' ownership of the copyright in the Sculpture, pursuant to the Letter of Employment, constituted a "plus factor" that would change the holding on the work for hire issue. The Artists have quoted correctly the first sentence of the Court of Appeals's discussion, but have omitted the second and determinative sentence. Both sentences are set forth here:

> We are not certain whether [copyright ownership] is a "plus factor," and therefore put off for another day deciding whether copyright ownership is probative of independent contractor status. Even were it to be weighed as a "plus factor," it would not change the outcome in this case. (20a)

REASONS FOR DENYING THE WRIT

It is apparent that the Artists' petition does not satisfy any of the standard reasons for granting a petition for a writ. This first appellate decision interpreting VARA does not conflict with any relevant decision of the Court, does not conflict with any decision of another United States court of appeals, does not conflict with a decision of a state court of last resort, has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power, and has not decided an important question of federal law that has not been, but should be, settled by the Court.[2]

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[1] 490 U.S. 730 (1989).

[2] Sup. Ct. Rule 10.

The Court of Appeals simply determined that in view of the unique facts of this case, the Artists were employees of SIG and Limited Partnership, and, therefore, the Sculpture was a work for hire under VARA.

The Artists concede that the Court of Appeals should have and did rely on *Reid* for the principles to be applied in a work for hire analysis. The Artists also concede that the Court of Appeals correctly determined, with two possible exceptions, the nature and effect of the evidence concerning the work for hire issue. The Artists' primary contention, which they express in different ways, is that Court of Appeals erred in not finding that the Artists' ownership of the copyright in the Sculpture was the controlling factor on the work for hire issue. The Artists' argument fails on multiple levels.

Before turning to the errors in the Artists' argument, it is appropriate to review the applicable law. VARA grants certain rights to authors that create works of visual art.[3] A work of visual art does not include "any work made for hire".[4] VARA expressly provides at 17 U.S.C. § 106A(b),(e)(2) that VARA rights are "distinct" from copyright:

> Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner.
>
> ***
>
> Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work.

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[3] 17 U.S.C. §106A.

[4] 17 U.S.C. §101.

In interpreting VARA, the Court is to give effect to the clear meaning of the statute as written,[5] and not interpret VARA so as to make any provision inoperative.[6] Moreover, the Court should not rewrite VARA to make it conform to the Court's concept of appropriate policy[7] or to improve the effect of the statute.[8]

In their effort to avoid the effect of the Letter of Employment, the undisputed conduct of the Artists, SIG and Limited Partnership during their relationship, the clear language of VARA, and a reasoned application of *Reid*, the Artists seek to have VARA rewritten to provide that the work for hire exclusion does not apply when the author of a work owns the copyright and, further, that in such circumstances the test formulated in *Reid* need not be followed. The Artists are wrong.

I. THE *REID* FACTORS SUPPORT A FINDING OF EMPLOYEE STATUS

The Artists' argument first fails because the Court of Appeals was correct in its holding, which has been ignored by the Artists, that "[e]ven were [copyright ownership] to be weighed as a 'plus factor', it would not change the outcome in this case." (20a) The Artists do not contend that the Court of

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[5] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.").

[6] *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("[It is an] 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative'...." *quoting Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).

[7] *Bankamerica Corp. v. U.S.*, 462 U.S. 122, 140 (1983) ("We are bound to respect that choice [of Congress]; we are not to rewrite the statute based on our notions of appropriate policy.").

[8] *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.").

Appeals incorrectly stated the standard established by *Reid* for determining whether a work is a work for hire. (16a, 17a). The Artists cannot seriously dispute, as the Court of Appeals held, that when the totality of the evidence is weighed, the single fact of ownership of the copyright would not create independent contractor status and would not change the outcome of the case.[9] Indeed, many of the indicia of employee status were stipulated facts reflecting a two year pattern of conduct by the Artists, SIG and Limited Partnership. The evidence, beginning with the Letter of Employment and its requirement that the Artists devote their "business time" "solely and exclusively" to SIG, continuing through the withholding of taxes, the provision of insurance and other benefits, the provision of supplies and tools, the restriction on the hiring of paid assistants, and the Artists' performance of tasks other than the creation of the Sculpture, and ending when the Artists filed for unemployment benefits, establishes that the Artists were employees and not independent contractors. (18a-22a).

More importantly, the assignment of the copyright to the Sculpture to the Artists in the Letter of Employment supports the finding that the Artists were employees. If the Artists had been independent contractors, it would not have been necessary to assign the copyright to them, they would have owned it.[10] Because, however, the Artists were hired as employees, they sought to obtain rights not otherwise available to them. The Artists, who retained counsel to advise and represent them with respect to the negotiation of the Letter of Employment, bargained for the assignment of the copyright. Thus, the assignment of the copyright in the Letter of Employment demonstrates that the Artists and their counsel understood that

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[9] *Reid*, 490 U.S. at 752 ("No one of these factors [used in evaluating employee status] is determinative.").

[10] See *Reid*, 490 U.S. at 750, 751 ("To determine whether a work is for hire under the Act, a court first should ascertain ... whether the work was prepared by an employee or an independent contractor.").

the Artists were hired as employees, not as independent contractors.

II. VARA RIGHTS ARE DISTINCT FROM COPYRIGHT

Confronted with the simple truth that the *Reid* analysis compels a finding that the Artists were employees even if the copyright ownership were a "plus factor", the Artists are forced to another argument: not only is copyright ownership a "plus factor", it is the only factor. As the Artists put it:

> There should be simply no need to engage in the *Reid* analysis where an unambiguous written agreement provides that the Artists will retain copyright ownership in their Work. (Pet. Brief 16).

The Artists' argument would require the rewriting of VARA and the abandonment of *Reid*. The argument should be rejected.

The Artists' argument that copyright ownership is the determinative factor is actually an argument that Congress silently created an exception to the work for hire exclusion when an artist owns the copyright to the work. There is nothing in VARA that supports the argument that a work for hire exclusion does not apply when an artist owns the copyright to art. To the contrary, VARA states at 17 U.S.C. § 106A(e)(2) that VARA rights are "distinct" from copyright.

Congress expressly provided that if an author did not own the copyright in the work he or she could nevertheless seek to enforce whatever VARA rights he or she might have. Congress easily could have provided that when the author of a work of art holds the copyright, the work cannot be a work for hire. The Artists argue that the Court should reject the determination of Congress that VARA rights are distinct from copyright and hold that the ownership of the copyright compels a finding of VARA rights. The Artists argue that by ignoring what Congress enacted the Court can find what Congress intended. These arguments are meritless.

The intent of Congress can best be found in the language of VARA.[11] Congress expressly separated VARA rights from copyright and expressly excluded works for hire from VARA protection. The Artists' argument that Congress did not intend for VARA rights to be bargained away by an artist who retains a copyright is wishful thinking designed to achieve a specific result in this idiosyncratic case.

There is no reason why an artist, like the Artists here, could not follow counsel's advice and agree with his or her prospective employer to retain a copyright, but not VARA rights. Similarly, the artist could agree to retain VARA rights, but not copyright, or to retain both rights or neither. Simply put, Congress allowed an artist to agree to any such arrangement and severed the copyright and VARA rights interests. Now, the Artists ask the Court to rewrite VARA to make the distinction between VARA rights and copyright inoperative. This argument, too, should be rejected.

III. THIS UNIQUE CASE DOES NOT WARRANT THE GRANT OF CERTIORARI

Even if the Court of Appeals had erred in its application of the *Reid* analysis, and even if the ownership of the copyright to the Sculpture were to create an exception to the work for hire exclusion of VARA, this case still does not warrant the grant of a writ. This first case applying VARA is a factual aberration. Associates, the owner of the Property, had no relationship to the Artists and, in fact, had leased the Property to Limited Partnership prior to enactment of VARA. Although Limited Partnership abandoned its interest in the Property to Associates, the Artists claimed that their VARA rights would bind Associates even after the termination of their employer's estate. The Artists, who were advised and represented by

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[11] *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) ("We 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'....", *quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 467 U.S. 189, 194 (1985)).

counsel prior to entering into the Letter of Employment, expressly agreed to permit modifications of the Sculpture. Further, although the Artists negotiated for the retention of copyright ownership, except for possessing that degree of skill and artistic freedom that one would expect artists to have, they otherwise had all the indicia of employee status. The Sculpture, which violates applicable building and electrical codes and constitutes a structural change to the Property, cannot be removed without some damage to some floor tiles that constitute a mosaic that forms part of the Sculpture. In sum, the unique factual context of the case would make a review by the Court a review of the correctness of factual findings and, thus, the case is unsuitable for the granting of a writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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